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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME BOARD AND UNITED STATES OF AMERICA,
Respondents,

PHILIP R. CONSOLO, ET AL., *Intervenors.*

Petition for Review of Order of the Federal Maritime Board

JOINT APPENDIX

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

**FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS
FROM ECUADOR TO THE UNITED STATES**

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS
FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Submitted May 12, 1959. Decided June 22, 1959

Respondent, in the operation of vessels between ports on the west coast of South America and ports on the North Atlantic coast of the United States and between ports on the west coast of South America and United States Gulf of Mexico ports, found to be a common carrier by water and therefore subject to the provisions of the Shipping Act, 1916, as amended.

Respondent's practice of contracting all of its refrigerated space on its vessels operating between ports in Ecuador and ports on the North Atlantic coast of the United States to one banana shipper to the exclusion of other qualified banana shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, as amended, and to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First thereof.

Forward-booking arrangements of periods not to exceed two years, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916, as amended.

Robert N. Kharasch and William J. Lippman for Philip R. Consolo, and *Richard Kurrus and Paul D. Page, Jr.*, for Banana Distributors, Inc., complainants.

Renato C. Giallorenzi and John H. Dougherty for Flota Mercante Grancolombiana, S.A., respondent and petitioner.

Elias Rosenzweig for Panama Ecuador Shipping Corporation, and *Thomas J. O'Neill* for Newark Banana Supply, interveners.

Robert J. Blackwell as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

These three consolidated proceedings relate to the lawfulness of the movement of bananas by Flota Mercante Grancolombiana, S.A. (Flota), from Ecuador to United States ports in the foreign commerce of the United States. In No. 827, Philip R. Consolo (Consolo) alleges that Flota, in refusing to allocate part of its refrigerated (reefer) space to Consolo for the movement of his bananas from Ecuador to U.S. North Atlantic ports, and in granting that space to Panama Ecuador Shipping Corporation (Panama Ecuador), unjustly discriminated against Consolo in violation of section 14 Fourth¹ of the Shipping Act, 1916, as amended (the Act), and unduly prejudiced him and unduly advantaged Panama Ecuador in violation of section 16² of the Act. Consolo further alleges that in contracting all of its reefer space to a single shipper, and in refusing the shipments of others, respondent operated contrary to the terms of a duly approved agreement, in violation of section 15 of the Act.

In No. 841, Banana Distributors, Inc. (Banana Distributors), similarly alleges violation of sections 14 Fourth and 16 of the Act.

¹ Section 14 of the Act provides in part:

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities*, due regard being had for the proper loading of the vessel and the available tonnage * * *." (Emphasis added)

² Section 16 of the Act provides in part:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Flota, in No. 835, petitioned for a declaratory order relating to its banana practices in the Ecuador-U.S. North Atlantic trade and the Ecuador-U.S. Gulf trade. It contends that it is not a common carrier of bananas, that its contracts with Panama Ecuador are not unlawful, and that the physical characteristics of its vessels are so different from those of its competitor Grace Line Inc. (Grace) that our rule in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278 (1957), and *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293 (1953), is not applicable to its banana carryings.

Public Counsel, a party in each of these proceedings, contends that, in contracting all of its reefer space to Panama Ecuador to the exclusion of other qualified shippers, including complainants here, Flota has violated sections 14 Fourth and 16 of the Act. In No. 835 it is his position that Flota be ordered to cancel its present contracts and make its reefer space available to all qualified shippers.

Panama Ecuador, an intervener in all of the proceedings, argues, in effect, that the physical limitations of the Flota vessels are such that only one shipper can be accommodated on them and therefore the resulting discrimination, prejudice, and advantage, if any, are not undue, unreasonable, or unjust.

Newark Banana Supply intervened in No. 841 but did not participate further in the proceedings.

FACTS

Flota operates six vessels in its common-carrier service between ports on the west coast of South America and U.S. North Atlantic ports, with a weekly frequency. At the time of hearing it employed five new 17½-knot vessels in the trade and a sixth was scheduled to be added in early 1959. They carry general cargo northbound and southbound on this regularly advertised and maintained service. Northbound sailings commence in Peru, proceed to Ecuador where bananas are loaded, to Buenaventura, Colombia, where coffee—Flota's most important northbound commodity—is loaded, then to Philadelphia where bananas are unloaded, and thence to Baltimore and New York. Although the vessels stop at Buenaventura for about 60 hours, steaming time from Guayaquil, Ecuador, to Philadelphia generally is 11 days.

Bananas have been carried by Flota in this trade since 1950, always under special contract, and never has the company accommodated more than one shipper at any one time.

Both Consolo and Banana Distributors are experienced banana shippers. Consolo repeatedly has sought reefer space from Flota for the carriage of its bananas since 1955. Banana Distributors un-

successfully sought reefer space on Flota's vessels in 1957. Others also have requested reefer space for bananas, but Flota made no check to determine whether such applicants were financially or otherwise responsible.

In 1955 Flota presented Consolo a rate for the entire reefer space on its five vessels in the trade. Consolo then countered with an offer to take the space if the rate on the lower hold were reduced 25 percent, or in the alternative, to occupy and pay for only the upper 'tween and lower 'tween decks of the reefer hold on each ship.⁵ Flota rejected this bid and later (July 25, 1955) entered into an exclusive two-year contract with the predecessors in interest of Panama Ecuador covering all the reefer space on the then five vessels in the trade. Consolo was advised that the space was under contract for two years. In 1957 Consolo again submitted an offer on Flota's reefer space, which was rejected in favor of an offer from Panama Ecuador covering, this time, a period of three years. After our decision in *Banana Distributors, Inc. v. Grace Line Inc.*, *supra*, both Consolo and Banana Distributors sought an allocation of reefer space from Flota, but without success.

The single reefer hold on each of Flota's vessels has a capacity of 55,000 cubic feet, and is divided into three levels: upper 'tween, lower 'tween, and lower deck. Hatches between these levels are closed off with three 450-pound plugs each, over which are placed hatch covers. The hold was designed primarily for the accommodation of frozen commodities in contrast to such holds on the Grace vessels, which were designed for the carriage of bananas. The longer the period the hold is open for loading, the longer it takes to reduce the hold temperature to the desired 52 degrees. Uncontraverted testimony indicates that with a 15-hour loading time, 40 hours are required to reduce the hold temperature, and that for every additional hour of loading it would take two additional hours of cooling time to reach 52 degrees.

As previously noted, the single shipper utilizing Flota's reefer hold usually completes loading within 13½ to 15 hours. There are two side ports (one on each side of the vessel) at the upper 'tween deck of the hold. A ramp runs from the side port to a pontoon secured to the vessel. Barges carrying from 800 to 4,000 stems tie up to the pontoon and stevedores then carry the cargo up the ramps and stow it as directed. The side ports are somewhat smaller than those on the Grace vessels, and they are higher above the water line, causing

⁵ The reefer hold on each ship is divided into three decks: upper 'tween, lower 'tween and lower hold. The lowest deck is so high that it will accommodate three upright layers of bananas, rather than two, subjecting the bottom layer to damage from excessive weight. This is not the case in Flota's new vessels: four of the five actually have less height in the lower hold than in the other two decks.

the ramp to be more steeply inclined. Too, the single ramp must be traversed both entering and leaving the ship, whereas on the Grace ships separate ramps are used for entering and exiting. Stowing begins in the lower hold, which necessitates descent via catwalks through hatches in the upper 'tween and lower 'tween decks. While the lower hold is being filled the select fruit is segregated and stowed in the upper 'tween deck. Upon completion, hatch plugs and covers must be replaced, sealing off the compartments. Ramps, catwalks, hatch plugs and covers, and bin boards impede, to some extent, the rapid loading of the compartments. The decks are fitted for stanchions, into which boards are inserted to form bins. Thus fruit is separated and more properly stowed. In unloading, generally all the fruit must be removed through one side port only. Unloading is accomplished in the inverse order of loading.

Flota also operates, as a common carrier by water, a service between ports on the west coast of South America and U. S. Gulf of Mexico ports, utilizing four older and slower vessels. These vessels have reefer facilities and involve an 8 to 10 day transit time from Ecuador to Galveston, Texas, where bananas are discharged for a single shipper (Grand Shipping, Inc.). This shipper enjoyed an exclusive-use contract of the space for a one-year period from June 1, 1957, to June 1, 1958, and it was renewed for a 6 months' period in view of the petition for the declaratory order herein. It is not apparent that other qualified banana shippers have applied for, and have been denied, reefer space in this trade.

RECOMMENDED DECISION

The presiding examiner found that (1) Flota is a common carrier of bananas from Ecuador to the Atlantic and Gulf coasts of the United States; (2) Flota's exclusion of Consolo and Banana Distributors from participation in the use of its reefer space on its vessels from Ecuador to U.S. Atlantic ports results in violation of sections 14 Fourth and 16 of the Act; (3) Flota should cancel its existing contracts for the carriage of bananas from Ecuador to the U. S. Atlantic and Gulf coasts; and (4) Flota should be required to prorate its reefer space on a fair and reasonable basis among existing shippers and all other qualified banana shippers, under forward-booking arrangements of not more than two years.

Exceptions were filed by Consolo, Flota, and Panama Ecuador. Replies were filed by Consolo, Panama Ecuador, Flota, and Public Counsel.

Although generally supporting the recommended decision, Consolo excepted to the failure of the examiner (1) to recommend that the

Board order Flota to allot to him 50,000 cu. ft. of reefer space per week, and (2) to make certain findings of fact relating to common carriage and discrimination and prejudice.

Flota excepted to the findings that (1) it is a common carrier of bananas; (2) it has violated sections 14 Fourth and 16 of the Act; and (3) it should cancel its present banana contracts and prorate its reefer space among all qualified shippers. It contends that the decision is not supported by evidence, is contrary to law, and that the findings of violation of sections 14 and 16 of the Act were beyond the scope of the proceeding.

In its exceptions Panama Ecuador claims that the findings are not supported by the record and that the conclusions are contrary to law. It contends that the contract between it and Flota is not subject to the jurisdiction of the Board since it involves contract carriage.

DISCUSSION AND CONCLUSIONS

What we said recently in the Supplemental Report in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 615 (herein referred to as the Supplemental Report) is appropriate here, and we feel is dispositive of the issues presented in these proceedings. It is clear that in the operation of its freighter vessels between Ecuador and U. S. North Atlantic ports and between Ecuador and U. S. Gulf of Mexico ports, Flota is a common carrier by water in the foreign commerce of the United States, and therefore is subject to the provisions of the Shipping Act and to the jurisdiction of this Board. It is of no moment that Flota has restricted its banana carryings to special contracts: " * * the movement of any commodity by a common carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down." (Supplemental Report, page 622) Likewise, in *Philip R. Consolo v. Grace Line Inc.*, *supra*, we stated " * * in spite of special arrangements of whatever sort, respondent [a common carrier by water] may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently." (page 300) And again, in the Supplemental Report, page 622, we said that " * * a common carrier * * * owes a duty to the shipping public to serve similarly situated shippers alike."

It is clear from this record that both complainants are qualified banana shippers. It is similarly clear that they were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was fav-

ored and advantaged. We find no justification for this conduct on the part of Flota, and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of sections 14 Fourth and 16 of the Act.

The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. Both companies are common carriers by water and the Act applies equally to both. Inferior refrigeration, smaller sideports (and higher from the water line), an additional deck, cumbersome hatch plugs, and other paraphernalia found on the Flota vessels do not exempt Flota from the discriminatory proscriptions of the statute: qualified banana shippers must not be excluded from participation in the reefer space.

The limitations of Flota's vessels relate, we believe, to operational matters which we feel may be more properly solved by an experienced carrier.⁴ Our concern is with the protection afforded by the Act to qualified shippers.

Much has been made of the loading time required. The present shipper takes from 13½ to 15 hours to complete loading. Testimony on the additional time required by multiple shippers varies. Panama Ecuador's witness believes that loading time would be increased by 7 to 12 hours if three shippers were accommodated, 10 to 15 additional hours if six shippers were granted space, and up to 50 additional hours if ten shippers were involved; on the other hand, Consolo estimated that only an additional hour would be necessary if six shippers shared the space, and Banana Distributor's witness was of the view that six shippers would cause a two hour delay. Based on the record, the examiner found that loading by multiple shippers should not add more than five hours to the present loading time. We feel that the judgment of the examiner is clearly supported by the evidence. But even if up to 15 additional hours were required to accommodate six banana shippers, that fact would not justify exclusive long term space contracts to a favored shipper and the denial of that space to a qualified competitor. Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable.

On this record we find and conclude that Flota's practices in the Ecuador-North Atlantic trade—the exclusion of Consolo and Banana Distributors from participation in its reefer space and the allocating of that space to Panama Ecuador exclusively—constitute a violation

⁴ Similarly, segregating or otherwise identifying bananas of different shippers is an operational function and was so recognized by the examiner. The solutions suggested by him do not constitute error. As he pointed out, "There may be other means of easy identification which would suggest themselves to those intimately familiar with the ramifications of the banana business."

of sections 14 Fourth and 16 First of the Act. Contracts with the present shipper must be cancelled and the reefer space on the vessels in this trade must be made available, upon fair and reasonable basis, to all qualified banana shippers. Similarly, we find that Flota, as a common carrier by water between Ecuador and U.S. Gulf of Mexico ports, must make its reefer space available to all qualified banana shippers in that trade.

As we said in the Supplemental Report, a forward-booking system under which space contracts would be firm for not to exceed two years, in view of the economic problems inherent in the banana importing business, would be characterized as "just" and "reasonable" as opposed to "unjust" and "unreasonable", which aptly describes the present system.

What we shall require of Flota is that it make its reefer space proportionally available to all qualified banana shippers, upon a fair and reasonable basis, under forward-booking arrangements of not to exceed two years. We feel, however, that the operational problems may best be solved by the parties concerned. Flota may, through reasonable rules and regulations, require bonds from shippers, provide for dead freight, inspection, loading, stowing, and discharging, as well as other reasonable requirements, taking into consideration the physical limitations of the vessels and their reefer accommodations and the like, which shippers must meet in order to qualify as users of space. At the end of any forward-booking period, Flota shall re-allocate its space for additional periods among qualified applicants consonant with our directives herein.

Since we believe that the foregoing disposes of the matter, we make no findings with reference to the allegations of violation of section 15 of the Act.

An appropriate order will be entered.

5 F.M.B.

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ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 22nd day of June A.D. 1959.

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS
FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

The proceedings docketed as Nos. 827 and 841 being at issue upon complaints and answers on file, and the proceeding docketed as No. 835 being at issue upon a petition for a declaratory order and replies thereto on file, and the proceedings having been consolidated and duly heard with respect to all issues other than reparation, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondent be, and it is hereby, notified and required, not later than August 1, 1959, to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended;

5 F.M.B.

2. Respondent, within ten (10) days after the date of service of this order, shall offer to its present banana shippers and to all qualified banana shippers, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to United States ports for a period of not to exceed two years, said period to begin not later than August 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

3. Respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respondent shall take into consideration (1) applicant's financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) applicant's ability to arrange for the purchase, loading, and stowing of the bananas to be shipped, and (3) applicant's ability to arrange for the discharge of bananas; and to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

4. Respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with, its receiving, handling, stowing, transporting, carrying, and discharging of bananas, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for performance of all of its obligations under the two-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking, (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any rights secured by him under said forward booking, (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned, (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, respondent to have the right to designate the stevedore or itself to perform the necessary stevedoring at the port of discharge, (e) the treatment as a single shipper those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

5. Respondent shall file with the Board (a) copies of the two-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to its receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

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6. The proceedings docketed as Nos. 827 and 841 be, and they are hereby, held open for further proceedings on the claims of complainants for reparation, if any; and

7. The proceeding docketed as No. 835 be, and it is hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER
Secretary.

5 F.M.B.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 10th day of July A.D. 1959

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S. A.—Carriage of Bananas from Ecuador to the United States

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

The order herein dated June 22, 1959 (served July 2, 1959), having provided, among other things, that respondent, within ten days after the service of the order, shall offer to its present banana shippers and to all qualified banana shippers, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on its vessels from Ecuador to United States

ports for a period of not to exceed two years, such period to begin not later than August 1, 1959; and respondent having filed a petition, among other things, to extend the 10-day period, which expires on July 12, 1959, to August 15, 1959; and replies in opposition to such petition having been filed by complainants in Nos. 827 and 841; and the time for all parties to file replies to the petition not expiring, under the Board's Rules of Practice and Procedure, until July 18, 1959; and good cause appearing:

It is ordered, That the time within which respondent shall offer refrigerated space to all qualified shippers be, and it is hereby, extended to and including August 1, 1959;

It is further ordered, That the time when the contracts for said space shall begin be, and it is hereby, extended to and including August 15, 1959; and

It is further ordered, That all other terms and provisions of the said order of June 22, 1959, shall remain unaffected hereby.

By the Board.

JAMES L. PIMPER
Secretary

Order

Flota Mercante Grancolombiana, S. A., having filed a petition seeking additional time for compliance of the order herein served July 2, 1959, and replies thereto having been filed by Philip R. Consolo and by Banana Distributors, Inc., and for good cause appearing:

It is ordered, That petitioner be, and it is hereby, notified and required to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found in these proceedings to be in violation of Section 14

and 16 of the Shipping Act, 1916, as amended, not later than September 1, 1959;

It is further ordered, That petitioner shall offer, not later than by August 14, 1959, to its present banana shippers and to all qualified banana shippers, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on petitioner's vessels from Ecuador to United States ports for a period of not to exceed two years, said period to begin not later than September 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

It is further ordered, That all other terms and provisions of the order served July 2, 1959, shall remain unaffected hereby.

By the Board.

JAMES L. PIMPER
Secretary

Decision Recommended by C. W. Robinson, Examiner

Flota Mercante Grancolombiana, S. A., found to be a common carrier of bananas from Ecuador to the Atlantic and Gulf coasts of the United States.

Exclusion by Flota Mercante Grancolombiana, S. A., of complainants from the use of refrigerated space on its vessels for the carriage of bananas from Ecuador to the Atlantic coast of the United States found to be in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916.

Flota Mercante Grancolombiana, S. A., should cancel its existing contracts for the carriage of bananas from Ecuador to the Atlantic and Gulf coasts of the United States.

4

The refrigerated space on the vessels of Flota Mercante Grancolombiana, S. A., operating from Ecuador to the Atlantic and Gulf coasts of the United States, should be prorated on a fair and reasonable basis among existing shippers and all qualified applicants therefor, under forward-booking arrangements of two years.

* * * * *

The complaint in No. 827 alleges that the failure of Flota Mercante Grancolombiana, S. A. (Flota), to allocate part of the refrigerated space on its vessels to complainant (Consolo) for the carriage of bananas from Ecuador to Atlantic ports of the United States, while at the same time contracting out all such space to another shipper of bananas, Panama Ecuador Shipping Corporation (Panama Ecuador), results in undue and unreasonable preference and advantage to that shipper and subjects complainant to undue and unreasonable prejudice and disadvantage in relation to such shipper, in violation of section 16 First of the Shipping Act, 1916 (the Act), and in unfair and unjust discrimination against complainant in the matter of cargo space, in violation of section 14 Fourth of the Act, and violates section 15 of the Act and F.M.B. Agreement No. 3302.¹ Complainant in No. 841 (Banana Distributors) makes substantially the same allegations except that it omits the reference to section 15 and Agreement No. 3302. No. 835 is a petition by Flota for a declaratory order as to whether its contracts with banana shippers to Atlantic and Gulf ports must be canceled in view of the Board's ruling in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278 (1957);² these shippers have threatened suit if Flota terminates their contracts.

¹ Flota is a member of Association of West Coast Steamship Companies (F.M.B. Agreement No. 3320), an association of common carriers transporting cargo from Ecuador and Pacific ports of Colombia to, among other places, Atlantic and Gulf ports of the United States.

² Now under review by the Circuit Court of Appeals for the Second Circuit (No. 24,872, argued December 5, 1958).

The three proceedings were consolidated for hearing. Complainants intervened in No. 835 but Banana Distributors did not file a brief. Panama Ecuador intervened in all three proceedings. Newark Banana Supply intervened in No. 841 but did not participate in the hearing or file a brief. Public Counsel intervened in No. 827. Although reparation is sought by complainants and a good deal of the early part of the hearing was devoted to that phase, the examiner deferred further action thereon, upon complainants' motion, pending the outcome of the proceedings on their merits.

PRELIMINARY FACTS

Flota was organized by the Governments of Colombia, Ecuador, and Venezuela (Venezuela no longer is part owner). It operates various common-carrier services, the two here involved being between the west coast of South America (exclusive of Chile) and United States Atlantic ports and between the west coast of South America (exclusive of Chile) and United States Gulf ports.

Between February 1950 and February 1954, Flota transported bananas on a sporadic and trial basis for three shippers from Ecuador to Atlantic ports, all under special agreements but never for more than one shipper at a time. In June 1952 it opened negotiations with Leonard Morey and Samuel Staff, of New York, for the exclusive use of the No. 3 hold of its vessels (the No. 3 hold is the only refrigerated space on the vessels) for the carriage of bananas from Ecuador. On July 20, 1955, a contract to this end was made between the parties for two years, the bananas to be unloaded at Philadelphia, Pennsylvania. The contract was later assigned to Exportadora de Productos Ecuatorianas, S. A., an Ecuadorian corporation, and was thereafter assigned to intervener Panama Ecuador. Exportadora purchases the fruit and sells it to Ecuadorian Fruit Import Corporation, which in turn sells it in the

United States. Panama Ecuador is the transporting company. All of the companies here mentioned are owned by Morey and Staff. The contract was renewed for three years on May 22, 1957, effective upon its expiration on July 19, 1957.

An agreement somewhat similar to that with Morey and Staff was executed by Flota with Grand Shipping, Inc., on July 3, 1957, effective June 1, 1957, for the refrigerated space in the 'tween deck of No. 3 hold on Flota's vessels from Ecuador to Galveston, Texas, for a period of one year, subject to renewal for a like term. Because of the pending petition for declaratory order, the contract was renewed for six months instead of a year.

Consolo is an experienced and qualified banana shipper. His first effort to secure space to the Atlantic coast on Flota's vessels was late in 1954, but no agreement was reached. In the spring of 1955 there were further discussions and Consolo inspected the refrigerated space on one vessel. A fixed price was set by Flota for the space, but since Consolo was of the opinion that the height of the lower hold was too great to permit the proper stowage of bananas,³ he made an offer to take the entire space if the rate for the lower hold was reduced; in the alternative, he offered to contract for the upper two decks only. Both offers were rejected. In July of 1955, as previously seen, Flota leased the space to Morey and Staff. Consolo again inquired about space possibly late in 1955 and also in 1956, but was told that all space was under contract. In February 1957, by letter, Flota asked Consolo to make a bid for the space, and though this was done, the offer was refused. In the fall of 1957 Consolo made several other unsuccessful attempts to secure space.

³ It is generally agreed that the ideal stowage of bananas calls for two stems upright and one stem flat. The lower hold of the Flota vessels in operation at the time of the negotiations was such that three stems could be stowed upright, but this was likely to cause damage to the bottom stems. Thus, if the shipper stowed two high and one flat he would be paying for space not utilized.

Beginning in August 1957, Banana Distributors, an experienced and qualified banana shipper, unsuccessfully sought space on Flota's Atlantic coast vessels. Counsel for the company stated at the hearing that the company had recently applied for space on the Gulf vessels also, but the record contains nothing more about such request. The petition of intervention filed by Newark Banana Supply states that petitioner had requested space to Philadelphia by letter to Flota dated October 14, 1957; as Newark did not participate in the hearing, however, the record contains no evidence as to its operations or its qualifications as a banana shipper. Other potential shippers of bananas have sought space to Atlantic and/or Gulf ports since June 1957, but Flota has not inquired as to their financial responsibility or as to their qualifications as banana shippers.

PRIMARY FACTS

In general. At least prior to 1955, Flota vessels were not considered desirable banana carriers because (1) of irregular sailings and arrivals, (2) unsatisfactory refrigeration facilities, and (3) too much height in the lower hold. Only two vessels were utilized in the Atlantic coast service up to 1953; in that year three more were added. Two of the vessels subsequently were withdrawn and placed in Flota's Pacific coast service, but were brought back to the Atlantic when the contract was made with Morey and Staff in July 1955. The refrigerated capacities of the five vessels covered by the contract ranged between 27,600 cubic feet and 62,115 cubic feet, and the vessels had a 35-day turnaround with weekly sailings from New York, generally on Friday. In December 1955 the Atlantic service was extended to Peru and a sixth vessel was added to maintain weekly service.

A recent building program has resulted in five new vessels being placed in the Atlantic service since the summer

of 1957; a sixth vessel is expected sometime early in 1959. The speed of the new vessels is several knots greater than that of the older ones, and each has about 55,000 cubic feet of refrigerated space (estimated slightly higher by Panama Ecuador's refrigeration expert). The evidence is convincing that the service has improved and become more reliable since the advent of the new vessels.

Bananas are loaded at Guayaquil (principally) and Puerto Bolivar, Ecuador, whereafter the vessel calls at Buenaventura, Colombia, for large quantities of coffee. As amended, the contract with Morey and Staff permits the vessel as much as 60 hours at intermediate ports in South America after bananas are loaded (according to Panama Ecuador's general manager, the vessels often spend 70-80 hours at such ports). From Buenaventura the vessel proceeds direct to Philadelphia for the discharge of bananas, thence to Baltimore and New York. Transit time from Guayaquil to Philadelphia is about 11 days; 12 days are allowed under the contract.

Flota and Grace Line Inc. are the only common carriers operating regularly between the west coast of South America and the Atlantic coast of the United States which carry bananas. Complainants and Panama Ecuador ship bananas on Grace's vessels. The two lines perform the same general type of service and are competitive with each other. Whereas all of Flota's vessels are freighters, operating on a weekly schedule, bananas are carried on Grace's passenger as well as freight vessels. As previously noted, only the No. 3 hold of the Flota vessels is refrigerated. This hold has three levels: upper 'tween deck, lower 'tween deck, and lower hold. The square of each hatch is closed off by means of three insulated plugs weighing approximately 450 pounds each, on top of which are placed hatch covers several inches thick. Grace freight vessels have two refrigerated holds and its passenger vessels have three refrigerated holds, but each hold has two

decks only. Furthermore, heavy insulated plugs are not used in the square of the hatch of the Grace vessels.

Bananas are carried under Flota's ordinary bill of lading, upon which is stamped a clause subjecting the transportation to the special contracts with the shippers. Loading and unloading are performed by the shippers and at their expense.

Refrigeration facilities. The record shows quite clearly that there are substantial differences in the refrigeration facilities of Flota and Grace vessels, so much so that Panama Ecuador's refrigeration expert has inspected 107 unloadings of Flota vessels and made several trips on the vessels from Ecuador to Philadelphia in order to check the outturn of the fruit and to survey and analyze the equipment and its operation. After his first few visits to the Grace vessels, which discharge at New York, the witness did not find it necessary to make further inspections.

The refrigerated hold of the Flota vessels was designed primarily to carry frozen cargo. The vessels employ a chill water system, using brine refrigerated by compressors and circulated through coils in each deck level, each deck thus being cooled independently. A reversible fan on each deck distributes the chilled air through a series of ducts on the bulkhead of that deck. In order to balance out the temperatures in the different areas, the direction of the air must be changed every five hours for the first two days after loading is completed, every day for the next five days, then every other day. There is one mechanical exhaust fan located near the ceiling, which takes care of all three decks.

The Flota system employs goosenecks for the entry of fresh air, one located on each side of the vessel. When the fan is going the gooseneck on the opposite side must be closed manually else the cold air be expelled through the latter instead of going through the hold. Starting the fan and shutting down the damper involve considerable work.

When the vacuum built up in the deck is broken, uncooled air comes in and permeates the deck.

The refrigerated holds of the Grace vessels were designed primarily to carry bananas. The refrigeration system is one of direct expansion coils, using Freon gas, and has about the same efficiency, proportionately, as that of the Flota vessels. The comparison ends at that point, however. Grace vessels have two centrifugal mechanical blowers, one forcing cool air through ducts to the port side and one doing the same on the starboard side, the air coming in under the floor boards. The exhaust air is carried out by gravity, the exhaust being located in the lower part of the hold where it can best take care of the gases exuded from the fruit. The system is not affected by door openings or leakage of air.

Grace vessels have a refrigeration engineer and usually two assistants. In contrast, Flota vessels usually have no separate refrigeration engineer, in which case the chief engineer is responsible for the proper working of the refrigerating system. Furthermore, the vessel's personnel is changed periodically, and as the language in use on board usually is Spanish or Italian, difficulties frequently arise in the operation of the system according to the shipper's instructions.

The following table compares the pertinent characteristics of Flota and Grace vessels:

	Flota	Grace
Air supply	20,000 cubic feet per minute	40,000 c.f.m.
Air change per cubic volume per hour	5.3 times	9.2 times
Fresh air	2,000 cubic feet per minute	4,000-6,000 c.f.m.
Horsepower	45-50	100

Loading. Bananas are loaded on Flota and Grace vessels in much the same general manner.⁴ The vessels of each are loaded from anchorage instead of at piers. There is an opening (sideport) on each side of the Flota vessels leading into the upper 'tween deck of the refrigerated hold. A pontoon is secured to the vessel under each sideport and a ramp is positioned between the pontoon and the opening. Banana-laden barges, of different heights and containing from 800 to 4,000 stems each, tie up alongside the pontoon and stevedores carry the individual stems on their shoulders up the ramp, into the top deck, thence down to the lower decks by means of other ramps placed in the square of each hatch. The stevedores return to the barge via the same ramp whereas on the Grace vessels they use a paralleling ramp.

The exterior and the interior ramps on Flota are at a steeper angle than those on Grace because of the height of the sideports from the waterline and the height of the decks. Furthermore, the sideports on Flota are lower and narrower than those on Grace. Loading Grace vessels is somewhat more simple than loading Flota vessels inasmuch as the former have only two decks as contrasted with the three decks on the Flota vessels, as previously stated.

In the case of Panama Ecuador on Flota vessels, full-scale loading by seven to 10 teams of stackers commences in the lower hold. At the same time, jumbo stems to the number of about 1,000 to every 12,000-13,000 stems on the individual vessel, which bring premium prices in the United States, are selected by fruit sizers at the sideports and loaded by two teams of stackers in the upper 'tween deck, where damage is least likely to occur. Because of the presence of the large refrigerator hatch plugs, the hatch covers, floor boards, stanchions, and bin boards,⁵ there is a

⁴ For more details as to the production and loading of bananas, see *Banana Distributors*, *supra*, particularly the examiner's recommended decision.

⁵ The decks are fitted for stanchions, into which boards are inserted to form bins. This permits separation of the fruit and ensures better stowage.

relatively small area in the lower 'tween deck that can be loaded when loading starts in the lower hold, hence loading of the lower 'tween deck generally does not proceed in volume until loading of the lower hold begins to slow down.

Some of the ramps to the lower hold are removed as it begins to fill, and stems then are stowed in the area vacated. When all but the square of the hatch has been filled, the remaining ramps are pulled up and stems are passed by hand to the dwindling stackers to fill the unoccupied space (this hand process reduces the loading speed to about 10 percent of the normal rate). The hatch plugs and covers are then put in place, sealing the lower hold. From this point the finishing of the lower 'tween deck commences. Before loading of the lower hold is completed the loading of the upper 'tween deck is accelerated; completion of the hold is accomplished when the lower 'tween deck is finished and sealed off.

Unloading. Unloading of the Flota vessels at Philadelphia is performed in the inverse order of loading. As the vessel is moored portside to the pier, unloading is through that side of the vessel only. The fruit nearest the sideport comes out first, whereafter a conveyor belt is placed in the hold and gradually worked back to the forward square of the hatch. As the square is cleared and the hatch plugs and covers are removed, the bananas in the square of the hatch in the lower 'tween deck are removed by hooks and ship's tackle attached to strings already affixed to the stems. When the plugs and covers are removed into the lower hold, the same procedure is there followed. Once the square of that hatch is cleared, a pocket-type elevator is lowered into the lower hold. At this stage about 80 percent of the fruit on the upper 'tween deck has been removed. By the time the elevator has been rigged, tested, and put to work, the upper 'tween deck is empty, whereupon teams of stevedores begin to unload the lower two decks. The use of conveyor belts between

the decks is not feasible on account of the angle of incline, hence the utilization of the pocket elevator.

DISCUSSION AND CONCLUSIONS

Flota contends that it is not a common carrier as to bananas, that its contracts with shippers are valid, and that the differences in the physical characteristics of the Grace vessels and its vessels are so great as to cause unreasonable delay in loading if there were more than one shipper of bananas. Panama Ecuador argues that, whether or not Flota be held to be a common carrier as to bananas, its contract with Flota is valid because it is impossible for more than one shipper of bananas to utilize the space at any one time; use by more than one shipper would result in confusion and even chaos, it is declared. Public Counsel maintains that Flota has violated sections 14 Fourth and 16 First of the Act in refusing to allocate space to complainants, and that Flota should be required to cancel its contracts with shippers and make its refrigerated space available to all qualified shippers of bananas under reasonable conditions.

In the absence of different underlying facts, the decisions of the Board in *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293 (1953), and *Banana Distributors, supra*, control in the present proceedings.

Loading and unloading time. Flota's witness stated that bananas are not as important to the company as coffee, that the company's southbound service is more important revenue-wise and traffic-wise than the northbound service, and that a material increase in the time of loading or unloading would interfere substantially with the southbound service. He added that any great delay might cause the company to abandon the carriage of bananas so as not to jeopardize the southbound service. He also stated, however, that the company would not object to more than one shipper if the loading and unloading time were not

increased materially, and that the company would be willing to give it a try if the Board so ordered.

All parties agree that, in view of the perishable nature of bananas, the fruit must be loaded, transported, and distributed at the earliest possible time following cutting from the tree. Panama Ecuador loads as many as 15,000 stems on a Flota vessel and usually completes loading in from 13½ to 15 hours, the contract allowing a maximum of 15 hours.⁶ Panama Ecuador's general manager believes that under optimum conditions the over-all loading time would be increased by 7 to 12 hours if three shippers shared the space, from 10 to 15 hours if there were six shippers, and up to 50 hours if 10 shippers were involved. Consolo estimated a delay of only one hour if there were six shippers, and Banana Distributors' secretary-treasurer thought there would be a delay of 2 hours with six shippers.

It is quite evident that one shipper can make the best use of the three decks since he can place teams of stackers wherever space is available at a particular time. It does not follow necessarily, however, that the presence of more than one shipper would so stall loading as to cause the vessel to be detained unreasonably.

The more shippers there are the more pontoons and barges would be involved in the loading. This would mean the shifting of pontoons and barges as the loading progresses. There is no contention that the withdrawal of one pontoon and the substitution of another would cause a delay of more than a few minutes. Even this delay could be eliminated by an agreement among shippers to share the same pontoon on each side of the vessel, a step which would expedite the loading and be of advantage to all shippers. Panama Ecuador usually has two or more barges tied up at each pontoon; if this can be done, there

⁶ When Grace opened its refrigerated space to all qualified shippers of bananas following the Board's order to that effect, it did not increase the existing permissible loading time beyond 12 hours.

would seem to be no reason why the barges of other shippers could not be tied alongside, it being remembered that the addition of other shippers would reduce the number of Panama Ecuador's barges proportionately. Thus, as the loading rate of one shipper tapers off for any reason, the fruit of another could be moved. Furthermore, there could be an agreement among shippers to use the same stevedores and supervisory personnel, to the advantage of all shippers.

There remains, of course, the problem of getting the bananas of a particular shipper into the space allocated to him. How can the stevedores know whose fruit they are carrying? Several answers readily come to mind. In the first place, as every stem presently is coated with a preparation to retard rot, the preparation could be colored in order to identify the owner. Thus, the checker at the sideport would designate the space where the particular stems are to be stowed. Secondly, the strings attached to the stems likewise could be of different colors. Finally, a small tag of appropriate color or other means of identification could be affixed to the stem. The foregoing suggestions are practical, inexpensive, and easy of application. There may be other means of easy identification which would suggest themselves to those intimately familiar with the ramifications of the banana business.

Having disposed of the loading situation up to the point of the sideports, the actual stowing of the fruit in the three decks must be considered. One of the points made by Panama Ecuador is that the individual shipper would have to remove his own internal ramps upon completion of the loading of his area, and that this would cause considerable delay because of the size of the ramps. This removal by the individual shipper could be dispensed with, however, as in the case of the exterior ramps, by all shippers agreeing to use the same ramps, which would not be removed until a particular deck was nearly completely filled. Since

the plugs and other gear present the same problems and occupy the same space, irrespective of the number of shippers, its presence should not affect materially the loading by more than one shipper.

It is true that the sharing of the space with other shippers would take away from Panama Ecuador the opportunity it now has of loading jumbo stems in the upper 'tween deck while loading of the ordinary-size stems is taking place in one or both of the other decks, but that result, standing alone, would not warrant the exclusion of other qualified shippers from Flota's vessels.

It would appear that Panama Ecuador's general manager is unduly alarmed at the prospect of more than one shipper sharing Flota's refrigerated space. The use of the space by more than one shipper, if properly coordinated and carried out in good faith, should entail no more than five hours additional time in the loading process. As the unloading at Philadelphia must be accomplished by means of a pocket elevator, as already pointed out, there should be virtually no difference in the unloading time simply because the bananas belong to more than one consignee. Assuming the stems to have been identified at the time of loading, and assuming that the same stevedores are used by all consignees for the unloading, the fruit should flow in an orderly fashion to the truck or other facility of the correct consignee (facilities for trucks are greater at Philadelphia than at the Grace pier in New York).

Multiple loading and unloading probably would cause some difficulty and confusion at first, but there should be an honest and sincere attempt by all shippers to smooth out the rough spots in a system that should prove to be wholly workable. The mere specter of a 3-deck hold should not be allowed to defeat the ingenuity of practical men well-versed in their business. While the problems attendant upon the use of the Flota facilities may be more accentuated than those encountered by the shippers of bananas

on the Grace vessels (see *Banana Distributors, supra*), there has been no indication that the sharing of the space on the Grace vessels has been impractical.

As Flota's vessels, under the present contract with Morey and Staff, are privileged to spend 60 hours at intermediate South American ports after loading bananas, as the accession to the service early in 1959 of the last of Flota's new vessels will give the company a well-rounded and fast fleet, and as Flota's transit time now is about the same as that of Grace, it is concluded that the additional maximum loading time of five hours for bananas is not likely to affect Flota's schedules to any appreciable extent.

Cooling facilities. The internal (pulp) temperature of bananas rises as they await loading. To retard ripening as much as possible, the temperature of the vessel's hold must be brought down as quickly as possible to 52-53 degrees. When the hold is opened for loading the temperature naturally climbs; it follows, of course, that the longer the loading period the more nearly the hold temperature approaches the outside temperature (the weather in the loading area of Ecuador ranges from warm to very hot, depending upon the season of the year), and the longer it takes the equipment to bring the hold temperature down to the proper level. The holds of the Grace vessels are ready for loading at the moment the barges come alongside. The same is not true as to the Flota vessels, which have carried general cargo southbound in the No. 3 hold; the refrigerator plugs and the hatch covers must be removed and the stanchions and the bin boards must be set up before loading can begin.

Panama Ecuador's refrigeration expert agrees that the Flota cooling system is generally satisfactory for the carriage of bananas, even though not as efficient as Grace's. In Grace it takes from 12 to 24 hours to reduce the hold temperature to the desired point; in Flota, it averages approximately 40 hours. Pulp temperatures on Grace can be satisfied in 23 to 24 hours; on Flota, 2 to 2½ days. The

witness is of the opinion that on the Flota vessels it would take 2 additional hours of cooling time for each additional hour of loading time beyond the 15-hour period now required by Panama Ecuador. In this he is supported by Panama Ecuador's general manager. There was no countervailing testimony. The estimate given does not seem extravagant.

Panama Ecuador contends that the quality of the bananas carried on Flota's vessels would be affected, and perhaps prevent a successful importing business, if the loading time were increased beyond 15 hours. It is hard to believe, however, that a maximum of 5 hours additional loading time would *seriously* affect the outturn. Under all the circumstances, it is found that such increased loading time would not jeopardize the carriage of bananas on Flota's vessels.⁷

Space arrangements. In *Banana Distributors, supra*, the Board said at page 286:

In view of the foregoing, the Board adopts the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among existing shippers and complainants and their supporting interveners, under forward-booking arrangements of 2 years. To this end, Grace shall cancel its existing contracts with three banana shippers and offer reefer space, upon reasonable notice, fairly and equitably, in

⁷ The evidence as to Flota's Gulf service is rather meager (the Gulf shipper did not participate in the hearing). Although the four Gulf vessels are older and slower than those used in the Atlantic service, and although the refrigeration and ventilation on the former are not so good as on the latter, the transit time to Galveston is from one to two days shorter than to Philadelphia. Sailings are about 10 days apart. Bananas are unloaded at the consignee's pier; they never have been unloaded at a public pier. Some general cargo is carried but not on every voyage; this is unloaded at another pier. Flota's witness stated that to shift to public piers to unload bananas for shippers other than the present one "would be killing." No good reason appears why Flota's Gulf vessels should not carry bananas for the general public rather than for one particular shipper; in such case, unloading of all the fruit could be accomplished at one public pier.

two-year forwarding-booking arrangements, to all qualified shippers.

Grace may require prospective shippers in this trade to post a bond covering the space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

Consolo urges here, as did one of the parties unsuccessfully in *Banana Distributors*, that the existing shipper be deferred in the assignment of space "because of past benefits accruing to it resulting from the fact that it monopolized the space during the past three and a half years in flagrant disregard of the law." No good reason appears why the general directives of the Board in *Banana Distributors* should not be followed in the present proceedings.

Section 15 of the Act. One of Consolo's arguments, as previously seen, is that Flota's failure to grant him space violates section 15 of the Act and F.M.B. Agreement No. 3302. Association of West Coast Steamship Companies is not a party to the present proceedings. In view of the conclusions herein reached, it is unnecessary to pursue the section-15 issue. The same question was raised in *Banana Distributors* but no action was taken on it by the Board.

RECOMMENDATIONS

The Board should find:

1. That Flota is a common carrier of bananas from Ecuador to the Atlantic and Gulf coasts of the United States;

2. That Flota's exclusion of Consolo and Banana Distributors from the use of refrigerated space on its vessels for the carriage of bananas from Ecuador to the Atlantic coast of the United States results in violation of section 14 Fourth and 16 First of the Act (the record contains no evidence upon which a finding can be made as to the operations and qualifications of intervener Newark Banana Supply);

3. That Flota should cancel its existing contracts for the carriage of bananas from Ecuador to the Atlantic and Gulf coasts of the United States; and

4. That the refrigerated space on Flota's vessels operating from Ecuador to the Atlantic and Gulf coasts of the United States should be prorated on a fair and reasonable basis among existing shippers and all qualified applicants therefor, under forward-booking arrangements of two years.

An appropriate order should be entered, but the record should be held open to give Flota an opportunity to accomplish the Board's directives.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S. A., *Petitioner,*

v.

FEDERAL MARITIME BOARD and UNITED STATES
OF AMERICA, *Respondents.*

Prehearing Stipulation

Counsel for all parties herein concur in the following prehearing stipulation.

I. *Issues.*

The issue, as stated by petitioner, is as follows:

“Whether the Federal Maritime Board properly concluded that petitioner, in denying to complainants reefer space for the carriage of bananas, and in granting space to other persons, pursuant to prior contractual arrangements, violated Section 14 Fourth and Section 16 First, Shipping Act, 1916.”

The issue, as stated by respondents and intervener Philip R. Consolo, is as follows:

“Has the Federal Maritime Board jurisdiction to find, and did it properly find that a steamship line in foreign commerce which

(a) is a common carrier, and

(b) regularly carries bananas in its refrigerated facilities may not commit its banana-carrying facilities under long term contracts to a single banana importer, to the exclusion of other banana importers.”

II. *Schedule for filing of briefs and joint appendix.*

Typewritten Briefs

Petitioner's brief, April 17, 1961.

Respondents' and Intervener's briefs, May 17, 1961.

Petitioner's reply brief, June 12, 1961.

Joint Appendix

Designations by petitioner, June 21, 1961.

Counterdesignations, June 28, 1961.

Meeting of counsel for final counterdesignations, in reply, and arrangements for printing, July 3, 1961.

Filing of printed joint appendix, July 13, 1961.

Printed Briefs

All briefs to be filed in printed form, July 24, 1961.

It is agreed the above schedule will be suspended if the Court grants a stay upon petitioner's motion.

February 17, 1961.

J. ALTON BOYER

J. Alton Boyer

Attorney for Petitioner,

Flota Mercante

Grancolombiana, S. A.

ROBERT E. MITCHELL

Robert E. Mitchell

Assistant General Counsel,

Federal Maritime Board

IRWIN A. SEIBEL

Irwin A. Seibel

Attorney,

Department of Justice

GEORGE F. GALLAND

George F. Galland

Attorney for Intervener,

Philip R. Consolo

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S. A., *Petitioner,*

v.

FEDERAL MARITIME BOARD and the UNITED STATES,
Respondents,

PHILIP R. CONSOLO, *Intervenor.*

Before: BASTIAN, *Circuit Judge*, in Chambers.

Order

Counsel for the parties in the above-entitled case having submitted their stipulation dated February 17, 1961, pur-

suant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation dated February 17, 1961, shall control further proceedings in this case and that the stipulation and this order shall be printed in the joint appendix.

Dated: February 20, 1961.

BEFORE THE
FEDERAL MARITIME BOARD

In re the Petition of
FLOTA MERCANTE GRANCOLOMBIANA, S. A.
for Issuance of a Declaratory Order

Petition

Pursuant to Rules 5 (i) and 10 of the Rules of Practice and Procedure of the Federal Maritime Board, Flota Mercante Grancolombiana, S. A. hereby files this petition requesting the Board to issue a declaratory order, after a full hearing, in order to terminate a controversy and to remove uncertainty which has arisen with reference to the validity of certain contracts heretofore entered into by Flota Mercante Grancolombiana, S. A. for the carriage of bananas between Ecuadorian and United States Gulf and Atlantic coast ports.

The Board is authorized and empowered by virtue of Section 5 (d) of the Administrative Procedure Act (60 Stat. 239, 5 U. S. C. A. § 1004 (d) (1946) to initiate such proceedings and issue appropriate orders. In addition thereto, since the subject matter presented hereby involves assertions of undue discrimination or preferences, it comes

within the scope of Sections 14, 16 and 22 of the Shipping Act of 1916 and accordingly within the Board's power and authority to hear the same.

Petitioner from August, 1949 to July, 1955 has sporadically carried bananas on its vessels for a number of shippers from Ecuadorian to United States ports. During the major portion of the time within the period encompassed by the dates hereinbefore set forth, the refrigerated spaces of the vessels owned and operated by the Petitioner were not used because there was no demand for such space.

At the present time Petitioner has contracts pending with Panama Ecuador Shipping Corporation and Grand Shipping Inc. under which it has agreed to furnish the said shippers with all of the refrigerated space available on its vessels. These contracts cover the carriage of bananas from Ecuadorian ports to United States Gulf and Atlantic coast ports. The contract for the carriage of bananas to the Gulf ports will expire on May 31, 1958 while on the other hand the contract for the carriage of bananas to the Atlantic coast ports expires on July 19, 1960. The aforesaid contracts were entered into with the shippers after extended negotiations and after the shippers had agreed to post sufficient guarantees demanded by Petitioner in order to insure to it that the shippers would fulfill all of their obligations under the said contracts.

Subsequent to the rulings of this Board in *Banana Distributors, Inc. v. Grace Line, Inc.*, Docket No. 771 and *Arthur Schwartz v. Grace Line, Inc.*, Docket No. 775, decided April 29, 1957, numerous firms and individuals advised the Petitioner that they desired that refrigerated space on vessels owned by Petitioner be made available to them for the transportation of bananas between Ecuadorian and United States ports. These prospective shippers have been advised by Petitioner that all of the available space aboard its vessels, suitable for carrying bananas from

Ecuadorian to United States ports, is under contract to two shippers and that the Petitioner would consider their applications for an allotment of space upon the termination of said contracts.

Petitioner has been advised by numerous prospective shippers or their attorneys that in their opinion the rulings of *Banana Distributors, Inc. v. Grace Line, Inc.* and *Arthur Schwartz v. Grace Line, Inc.*, supra, compel the Petitioner to rescind and cancel its present contracts and to pro-rate the available space among qualified shippers. The present shippers under contract with the Petitioner have been advised of the demands made upon the Petitioner by the prospective shippers and they in turn have advised the Petitioner that in the event Petitioner cancels said contracts, that it will subject itself to a suit or suits for breach of contract. The prospective shippers state that claims for reparations will be made unless Petitioner allocates a portion of the refrigerated space to them.

In both *Banana Distributors, Inc. v. Grace Line, Inc.* and *Arthur Schwartz v. Grace Line, Inc.*, supra, neither the present shippers of Petitioner nor the Petitioner were made a party thereto.

The demands on one hand of the present shippers of Petitioner that it adhere to its contracts with them and the demands on the other hand of the prospective shippers requesting Petitioner to terminate forthwith its present contracts and allocate the refrigerated space of its vessels, places the Petitioner squarely in the middle of a controversy which has created an uncertainty involving the rights of the Petitioner with relation to the demand made upon it by its shippers under the existing contracts wherein they claim that the Petitioner cannot cancel the contracts without breaching them and the demands of the prospective shippers requesting Petitioner to adhere to the *Banana Distributors, Inc. v. Grace*

Line, Inc. and Arthur Schwartz v. Grace Line, Inc., supra, rulings. This controversy requires clarification of the position of Petitioner in the light of the present contracts and the *Grace Line* rulings.

Petitioner submits that unless the issues raised hereby are determined by the Board, it will be subjected to suits for damages and claims for reparations by either present or prospective shippers. The controversy involves substantial rights of Petitioner which require a determination thereof so that all uncertainties created by the *Grace Line* rulings with regard to the contracts entered into by Petitioner with its present shippers will be clarified. The issue involved in the controversy, which have given rise to the uncertainty and which must be determined by this Board after a full hearing and upon consideration of all of the evidence, is as follows:

Whether Petitioner is required under the rulings of the Federal Maritime Board in *Banana Distributors, Inc. v. Grace Line, Inc.*, Docket No. 771, and *Arthur Schwartz v. Grace Line, Inc.*, Docket No. 775, to cancel the contracts which it has with its present shippers for the carriage of bananas from Ecuadorian ports to United States ports.

WHEREFORE, it is respectfully prayed by Flota Mercante Grancolombiana, S. A., that a declaratory order issue after a full hearing determining the validity of its present contracts.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

By: ALVARO DIAZ S.
Managing Director

State of New York,
County of New York—ss.:

ALVARO DIAZ S., being first duly sworn on oath, deposes and says that he is Managing Director of the Petitioner herein and is the person who signed the foregoing Petition; that he has read the Petition and that the facts set forth without qualification are true and that the facts stated thereupon upon information received from others affiant believes to be true.

ALVARO DIAZ S.

Sworn to before me this
30th day of October, 1957.

LENORE SCALLEY

Notary Public, State of New York

No. 41-8778800

Qualified in Queens County

Cert. filed in New York Co. Clk.

Commission Expires March 30, 1958

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 827

PHILIP R. CONSOLO, *Complainant*,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

PANAMA ECUADOR SHIPPING CORPORATION, *Respondents*.

Complaint

1. Complainant is an individual, having his principal office in Miami, Florida, engaged in the business of importing bananas into the United States via the Atlantic Coast from various foreign countries, including Ecuador.

2. Respondent Flota Mercante Grancolombiana, S. A. (hereafter called Grancolombiana) is a corporation or-

ganized under the laws of Colombia, having its principal office at Apartado Aereo 44-82, Bogota, Colombia. It is represented in the United States by Transportadora Grancolombiana Ltda., as general agent. Such agent maintains an office at 52 Wall Street, New York 5, N. Y. Grancolombiana is a common carrier by water of freight in the foreign commerce of the United States in the trade from Ecuador to ports on the Atlantic Coast of the United States. As such common carrier, Grancolombiana is a member of the Association of West Coast Steamship Companies (hereafter called the Conference), organized under Agreement 3302, which agreement, with amendments thereto, was approved by the predecessors of this Board pursuant to section 15 of the Shipping Act, 1916.

3. Respondent Panama Ecuador Shipping Corporation is a corporation which presently has a contract with Respondent Grancolombiana for all of the refrigerated space suitable for bananas on Grancolombiana's vessels in service from Ecuador to United States Atlantic ports. The place of incorporation and the address of Panama Ecuador Shipping Corporation are unknown to Complainant but Complainant believes that communications addressed to it in care of Grancolombiana or its general agent will be duly delivered.

4. The operations of Grancolombiana as set forth in paragraph 2 above constitute a common carrier liner service.

5. Grancolombiana's service from Ecuador to United States Atlantic ports has operated since 1955, and on information and belief still operates, on approximately a weekly schedule, with vessels which have refrigerated chambers suitable for the transportation of bananas. Such vessels since 1955 have transported bananas from Ecuador to the port of Philadelphia. The refrigerated space suitable for bananas in Grancolombiana's vessels in Ecuador-U.S. Atlantic service ranges from approximately 27,000

cubic feet to approximately 62,000 cubic feet per vessel and averages approximately 50,000 cubic feet per week.

6. Complainant at all times during the period of two years preceding the date of this complaint has been in a position to purchase and has been continuously engaged in purchasing bananas from growers in Ecuador, and has been in a position to sell and has been continuously engaged in selling such bananas in the United States. On various occasions between 1955 and the date of this complaint, Complainant has demanded that Grancolombiana make available to Complainant refrigerated space suitable for bananas in the vessels operated by Grancolombiana from Ecuador to United States Atlantic ports. Initially, Complainant requested all of such space because Grancolombiana offered it only as a unit. After this Board's decision in *Banana Distributors, Inc. v. Grace Line Inc.*, Complainant offered to contract for less than the whole of such space, on the basis of a fair and reasonable allocation. Grancolombiana has failed to comply in whole or in part with Complainant's demands. Moreover, after Complainant had submitted such demands, Grancolombiana contracted all of its refrigerated space in its service from Ecuador to the Atlantic Coast of the United States to another applicant, namely Respondent Panama Ecuador Shipping Corporation.

7. Grancolombiana's refusal and failure to allot refrigerated space to Complainant was and is based upon the fact that the whole of such space has, as aforesaid, been contracted for a period of approximately two years to the Panama Ecuador Shipping Corporation, a competitor of Complainant.

8. Grancolombiana's refusal and failure to allot refrigerated space to Complainant, as aforesaid, confers an undue and unreasonable preference and advantage upon the aforementioned shipper to whom Grancolombiana has purported to sell the whole of its refrigerated space in the

trade from Ecuador to United States Atlantic ports, and subjects Complainant to undue and unreasonable prejudice and disadvantage in relation to such shippers, all in violation of paragraph First of section 16 of the Shipping Act, 1916.

9. Grancolombiana's allotment of the whole of its refrigerated space to the shipper aforementioned, and its consequent refusal of any portion of such space to Complainant, constitutes unfair treatment of and unjust discrimination against Complainant in the matter of cargo space accommodations and other facilities (particularly refrigeration facilities), due regard being had for the proper loading of Grancolombiana's vessels and the tonnage available to such vessels, in violation of paragraph Fourth of section 14 of the Shipping Act, 1916.

10. Under Article 1 of Agreement No. 3302, the Conference has jurisdiction over and deals with "the transportation of northbound cargo from Pacific ports of Colombia or Ecuador" to various destinations including United States ports on the Atlantic coast. The member lines of said Conference, including Grancolombiana, are defined by the same article as common carriers by water. As such common carriers, the Conference members, including Grancolombiana, are obliged to serve all shippers, including shippers of bananas, fairly and with freedom from unjust discrimination. In refusing cargo space accommodations to Complainant in accordance with its obligations as a common carrier, Grancolombiana is acting in violation of section 15 of the Shipping Act, 1916, and in violation of Agreement No. 3302 as amended.

11. By reason of the facts hereinabove set forth, Complainant has been unlawfully deprived of the opportunity to conduct the business of importing bananas from Ecuador to the United States on Respondent's vessels and has lost profits incident thereto during two years prior to the date of this complaint, in the sum of \$600,000.00.

WHEREFORE, Complainant requests that an order be issued by the Board (a) adjudging the aforementioned contracts between Grancolombiana and Panama Ecuador Shipping Corporation to be contrary to law, and void; (b) directing Respondents to cease and desist from carrying out their aforesaid contract for shipment of bananas from Ecuador to the United States, to the extent that such contract impairs the legal rights of Complainant to ship bananas via Grancolombiana's vessels; (c) requiring Grancolombiana to allot immediately to Complainant (subject to physical limitations of vessel capacity) refrigerated space for shipment of bananas in Grancolombiana's vessels in the trade from Ecuador to United States Atlantic ports, averaging 50,000 cubic feet per week, or such portion thereof as the Board may find to constitute Complainant's fair share of refrigerated space in such vessels; (d) ordering Grancolombiana to pay reparation to Complainant for his damages to the date of this complaint as above set forth in the amount of \$600,000.00, together with such damages as may accrue up to the date of the Board's final disposition of this proceeding and (e) awarding such other and further relief as the Board may determine to be just and lawful.

BEFORE THE
FEDERAL MARITIME BOARD

Docket No. 841

BANANA DISTRIBUTORS, INC., *Complainant*,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A., *Respondent*.

Complaint

I. Complainant is a corporation duly organized and existing under the laws of the State of New York, having its principal office at 30 Vesey Street, New York 4, New York,

engaged in the business of importing bananas into Atlantic Coast ports of the United States from various countries in Central and South America, including Ecuador.

II. Respondent is a corporation organized and existing under the laws of the Republic of Colombia, having its principal offices at Bogota, Colombia. Its general agent in the United States is Transportadora Grancolombiana Ltda., which agent maintains offices at 79 Pine Street, New York, New York. Respondent is a common carrier by water engaged in transporting cargo, including bananas, from Ecuador to ports on the Atlantic Coast of the United States, and as such is subject to the provisions of the Shipping Act, 1916, as amended.

III. A. Since 1955, Respondent has transported bananas, as a part of the above-described, common-carrier liner operation, from Ecuador to Philadelphia, and its vessels, operating in this trade, have refrigerated space suitable for carrying bananas ranging from approximately 27,000 cubic feet to approximately 62,000 cubic feet per vessel.

B. At various times since 1955, Complainant has demanded that Respondent make available to Complainant a portion of the refrigerated space on Respondent's vessels, in accordance with Respondent's obligations and duties as a common carrier under the Shipping Act, 1916, as amended. Complainant has been, at all times during at least the two-year period immediately preceding the filing of this Complaint, in a position to purchase bananas from growers and suppliers in Ecuador, to deliver them to Respondent's vessels at Ecuadorian ports, and to distribute and sell such bananas at a profit in markets on the Eastern seaboard of the United States and territories in proximity thereto.

C. Respondent has failed to comply with Complainant's demands for a reasonable and fair allocation of such refrigerated space. This refusal of Respondent to meet its

obligations as a common carrier has assumedly been based upon the fact that all of such banana-carrying refrigerated space is contracted, at least until July 20, 1959, to one shipper of bananas, who is a competitor of Complainant in this trade.

IV. A. Respondent's refusal and failure to furnish refrigerated space to Complainant as aforesaid confers an undue and unreasonable preference upon that shipper to whom Respondent has sold its entire refrigerated space on its cargo vessels in the trade from Ecuador to United States Atlantic ports, and subjects Complainant to undue prejudice and disadvantage in relation to such shipper, all in violation of paragraph "First" of Section 16 of the Shipping Act 1916, as amended.

B. Respondent's allotment to one preferred shipper, on a long-term contract basis, of the entire refrigerated space available for the northbound transportation of bananas on its cargo vessels and its consequent refusal of any portion of such space to Complainant constitutes unfair treatment of and unjust discrimination against Complainant in the matter of cargo space accommodations and other facilities (particularly refrigeration facilities), due regard being had for the proper loading of Respondent's vessels and the tonnage available to such vessels, all in violation of paragraph "Fourth" of Section 14 of the Shipping Act 1916.

V. By reason of the facts hereinbefore set forth, Complainant has been unlawfully prevented from utilizing the refrigerated space on Respondent's vessels, for the importation of bananas from Ecuador to United States Atlantic ports, and, during the two-year period immediately preceding the date of filing of this Complaint, has suffered damage, due to loss of profits incident to such business, in the sum of Six Hundred Thousand Dollars (\$600,000.00).

WHEREFORE, Complainant prays that Respondent be required to answer the charges herein; that after due hear-

ing and investigation an order be issued by the Board (a) adjudging the aforementioned contract between Respondent and its present preferred shipper of bananas to be contrary to law, and void; (b) directing Respondent to cease and desist from carrying out the aforesaid contract between Respondent and its preferred shipper of bananas from Ecuador to the United States, to the extent that such contract impairs the legal rights of Complainant to ship bananas via Respondent's vessels; (c) requiring Respondent to allot immediately to Complainant refrigerated space on Respondent's cargo vessels for the weekly shipment of bananas from Ecuador to United States Atlantic ports, in the amount of 50,000 cubic feet, or such portion thereof as the Board may find to constitute Complainant's fair and equitable share of refrigerated space in such vessels; (d) ordering Respondent to pay reparation to Complainant for his damages to the date of this Complaint as above set forth in the amount of \$600,000.00, together with such damages as may accrue up to the date of the Board's final disposition of this proceeding; and (e) awarding such other and further relief as the Board may determine to be just and lawful.

BANANA DISTRIBUTORS, INC.

By (Sgd.) SOL PALITZ

Sol Palitz

Title

Vice President

30 Vesey Street

New York 7, New York

(Sgd.) RICHARD W. KURRUS

Richard W. Kurrus

Attorney for Complainant

423 Washington

Building

Washington, D. C.

Filed: July 21, 1958.

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 827

PHILIP R. CONSOLO, *Complainant*,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

PANAMA ECUADOR SHIPPING CORPORATION, *Respondents*.**Petition**

Flota Mercante Grancolombiana, S. A., a Respondent in the above-entitled proceeding, hereby respectfully petitions this Honorable Board, by Renato C. Giallorenzi, its attorney, for an extension of time within which to answer the complaint heretofore filed in the above-entitled matter by Philip R. Consolo.

That on October 30, 1957, the undersigned, on behalf of Flota Mercante Grancolombiana, S. A., filed a petition with the Federal Maritime Board for the issuance of a Declaratory Order at which time a copy of the petition was duly mailed to Philip R. Consolo, the Complainant in the above-entitled proceeding at the address indicated by him in the complaint filed in the above-entitled proceeding.

That on November 8, 1957, the Federal Maritime Board acknowledged the receipt of the petition filed by Flota Mercante Grancolombiana, S. A. for the issuance of a Declaratory Order.

That the Respondent, Flota Mercante Grancolombiana, S. A., in its petition for the issuance of a Declaratory Order, stated to the Federal Maritime Board that by reason of its decisions in *Banana Distributors, Inc. v. Grace Line, Inc.*, #771 and *Arthur Schwartz v. Grace Line, Inc.*, #775, numerous firms including the Complainant, had demanded that Flota Mercante Grancolombiana, S. A. rescind and cancel its present contracts and pro-rate the available refrigerated space, on its vessels which ply between Ecuadorian and United States port, among qualified shippers.

The Federal Maritime Board at the same time was advised by Flota Mercante Grancolombiana, S. A., in its Petition for the issuance of a Declaratory Order, that its present shippers with whom it has contracts to carry bananas from Ecuadorian to United States ports, had advised it that in the event it cancelled the existing contracts, it would be subjecting itself to a suit for damages. The Respondent, Flota Mercante Grancolombiana, S. A., having been placed by its present and prospective shippers in a position whereby it would be subjected to suit whichever step it took, deemed, in its best interests, to file the Petition for the issuance of a Declaratory Order, which it promptly did.

Subsequently, and on or about November 15, 1957, the Complainant, Philip R. Consolo, filed a complaint against Flota Mercante Grancolombiana, S. A., copy of which was subsequently served on the Respondent, Flota Mercante Grancolombiana, S. A., at which time it was advised that its answer had to be filed with the Board within twenty (20) days from the date of service, namely, December 5, 1957.

That in view of the fact that Respondent, Flota Mercante Grancolombiana, S. A., filed its Petition for the issuance of a Declaratory Order on or about October 30, 1957, it is respectfully requested that the time of the Respondent, Flota Mercante Grancolombiana, S. A., to answer the complaint in the above-entitled proceeding, be extended until such time as this Honorable Board has acted upon the Petition heretofore filed by the Respondent, Flota Mercante Grancolombiana, S. A.

That the subject matter of the Petition heretofore filed for the issuance of a Declaratory Order by Flota Mercante Grancolombiana, S. A., is similar in many respects to the subject matter of the complaint filed by Philip R. Consolo in the above-entitled proceeding, and in view of the fact that Flota Mercante Grancolombiana, S. A. filed its Peti-

tion for the issuance of a Declaratory Order prior to the filing of the complaint in the above-entitled matter, it is respectfully requested that until such time as the Federal Maritime Board acts upon the Petition of Flota Mercante Grancolombiana, S. A., that Flota Mercante Grancolombiana, S. A.'s time to answer the complaint in the above-entitled matter be extended.

WHEREFORE, it is respectfully prayed that the time of Flota Mercante Grancolombiana, S. A. to answer the complaint in the above-entitled matter be extended until such time as the Federal Maritime Board has acted upon the Petition heretofore filed by Flota Mercante Grancolombiana, S. A.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

By: RENATO C. GIALLORENZI
Attorney

FEDERAL MARITIME BOARD
WASHINGTON 25, D. C.

December 5, 1957

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

and

PANAMA ECUADOR SHIPPING CORPORATION

Notice of Enlargement of Time to File Answers

A petition having been filed by respondent Flota Mercante Grancolombiana, S. A., requesting that the time within which to answer the complaint herein be extended until such time as the Board has acted upon the petition of said

respondent for a declaratory order in a separate proceeding to determine said respondent's status as a carrier of bananas from Ecuador to United States ports, and respondent Panama Ecuador Shipping Corporation having requested an extension until December 19, 1957, to file its answer, and complainant having filed a reply opposing the petition of respondent Flota Mercante Grancolombiana, S. A., and complainant having no objection to an extension until December 19, 1957, to file answers, and insufficient reason appearing why the orderly processing of the present proceeding should be delayed until the Board has acted upon the said petition for declaratory order, and good cause appearing, the time to file answers is hereby enlarged to and including December 19, 1957.

JAMES L. PIMPER
James L. Pimper
Secretary

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 827

PHILIP R. CONSOLO, *Complainant*,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A. PANAMA ECUADOR
SHIPPING CORPORATION, *Respondents*.

Answer

Respondent, Flota Mercante Grancolombiana, S. A., by Renato C. Giallorenzi, its attorney, answering the complaint herein, respectfully alleges:

1. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "1" of the complaint.

2. Admits that it is a corporation duly organized and existing under the laws of the Republic of Colombia, hav-

ing its principal office at Bogota, Colombia, and that its general agent in the United States of America is Transportadora Grancolombiana Ltda., which maintains offices at 79 Pine Street, New York, N. Y.

Admits that as part of its business activities it is engaged as a common carrier by water of freight in the foreign commerce of the United States, between ports in Ecuador and ports on the Atlantic coast of the United States, but denies that it is engaged in the transportation of bananas as a common carrier by water between the ports of the aforesaid countries.

Admits that only in connection with and for the purposes of its operations and business as a common carrier by water, it is a party to a steamship conference known as the Association of West Coast Steamship Companies, Agreement No. 3302, and that said agreement was approved by the predecessors of this Board pursuant to Section 15 of the Shipping Act, 1916 and continues as amended in effect.

Except as so admitted and denied, Respondent denies the remaining allegations contained in Paragraph "2" of the complaint.

3. Admits that the respondent, Panama Ecuador Shipping Corporation, presently has a contract with it for all of the refrigerated space suitable for the carriage of bananas on its vessels in service from Ecuador to United States Atlantic ports and except as herein admitted, denies the remaining allegations contained in Paragraph "3" of the complaint.

4. Admits that certain of its operations between Ecuadorian ports and United States Atlantic ports constitute a common carrier liner service but denies that it is a common carrier of bananas from ports in Ecuador to ports on the Atlantic coast of the United States.

Except as so admitted and denied, Respondent denies the remaining allegations contained in Paragraph "4" of the complaint.

5. Admits that it has operated and still operates a service from Ecuador to United States Atlantic ports with vessels which have refrigerated chambers suitable for the transportation of bananas for the account of one shipper only and do not permit of the allocation of space therein for more than one shipper and that said vessels have transported bananas from Ecuador to the port of Philadelphia since 1955 and that the refrigerated space suitable for bananas in respondent's vessels in Ecuador-United States Atlantic services ranges from approximately 27,000 cubic feet to approximately 62,000 cubic feet per vessel and except as herein admitted, denies the remaining allegations contained in Paragraph "5" of the complaint.

6. Admits that on occasion the complainant inquired of the respondent, Flota Mercante Grancolombiana, S. A., concerning the availability of refrigerated space for the carriage of bananas in the vessels operated by it from Ecuador to United States Atlantic ports, which space had been considered by complainant to be unsuitable for the carriage of bananas between Ecuador and United States Atlantic ports; and that complainant further requested that it be allowed to bid for refrigerated space on respondent, Flota Mercante Grancolombiana, S. A.'s, vessels, which space was subsequently and in its entirety contracted to respondent, Panama Ecuador Shipping Corporation, after the said company offered to pay to respondent, Flota Mercante Grancolombiana, S. A., a higher freight rate than any other person firm or corporation including complainant seeking such space and except as herein admitted, denies the remaining allegations contained in Paragraph "6" of the complaint.

7. Admits that it has contracted the whole of the refrigerated space of its vessels for a period of approximately three years commencing July 20, 1957 subject to

cancellation of said contract at the end of two years to the respondent, Panama Ecuador Shipping Corporation, and except as herein admitted, denies the remaining allegations contained in Paragraph "7" of the complaint.

8. Denies each and every allegation contained in Paragraphs "8", "9", "10" and "11" of the complaint.

WHEREFORE, Respondent, Flota Mercante Grancolombiana, S. A., prays that the complaint in this proceeding be dismissed.

Respectfully submitted,

Dated:

New York, N. Y.

December 18, 1957.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

By: ALVARO DIAZ S

Managing Director

RENATO C. GIALLORENZI

Renato C. Giallorenzi

Attorney for Respondent,

Flota Mercante Grancolombiana,
S. A.

50 Broad Street

New York 4, N. Y.

January 9, 1958

Department of Commerce

Federal Maritime Board

Washington 25, D. C.

Petition of Flota Mercante Grancolombiana

Gentlemen:

On or about October 30, 1957, I filed with your good selves a petition in the above entitled matter, the receipt of which you acknowledged by notice dated November 8.

I would appreciate it if you would advise me at your very earliest convenience of the action which your Board will take in connection with said petition. If necessary, I will be pleased to come to Washington at any time you suggest.

You undoubtedly know that subsequent to the filing of my petition, Philip R. Consolo filed a complaint against my client bearing Docket No. 827, which complaint in the main raises precisely the same issues which my client would like to have adjudicated in the petition filed with your good selves.

Very truly yours,

RENATO C. GIALLORENZI

January 20, 1958

Renato C. Giallorenzi, Esquire
50 Broad Street
New York, New York

Re: *Petition of Flota Mercante Grancolombiana, S. A.
for Declaratory Order*

Dear Mr. Giallorenzi:

In response to your inquiry of January 9, 1958, you are advised that the aforesaid petition is under consideration and early action is anticipated.

You will promptly be advised of the Board's action.

Very truly yours,

L. TIBBOTT

Chief, Regulation Office

March 31, 1958

Mr. G. O. Basham
Chief Examiner
Federal Maritime Board
Washington 25, D. C.

Re: FMB Docket No. 827
Consolo v. Grancolombiana

Dear Mr. Basham:

I should appreciate your setting the above-mentioned proceeding for prehearing conference at an early date.

Very truly yours,

GEORGE F. GALLAND

GFG:jw

cc. Elkan Turk, Jr., Esq.
Renato C. Giallorenzi, Esq.

April 2, 1958

Mr. G. O. Basham
Chief Examiner
Federal Maritime Board
Washington 25, D. C.

Re: FMB Docket No. 827
Consolo v. Grancolombiana

Dear Mr. Basham:

I acknowledge receipt of a copy of a letter addressed to you on March 31, 1958 by Mr. Galland. I will be pleased to attend at a pre-trial conference. However, my calendar for the month of April is exceedingly heavy and it would be most difficult for me to come to Washington during this

month. I would suggest that the conference be held any day during the week of May 5th.

Awaiting to hear from you, I remain

Very truly yours,

RENATO C. GIALLORENZI

RCG:cmp

c.c. Galland, Kharasch & Calkins, Esqs.

c.c. Elkan Turk, Jr., Esq.

FEDERAL MARITIME BOARD
WASHINGTON 25, D. C.

In your reply

Refer to file No.

A17-15:060

Dkt. No. 827

April 2, 1958

George F. Galland, Esq.

Galland, Kharasch & Calkins

1413 K Street, N. W.

Washington 5, D. C.

Dear Sir:

Receipt is acknowledged of your letter of March 31, 1958, requesting that this matter be set for prehearing conference at an early date.

As you know, there is pending before the Board a petition by Grancolombiana for a declaratory order as to that company's status in the carriage of bananas. The issues in the present proceeding and in the declaratory-order proceeding being somewhat similar, the present proceeding is being held in abeyance until the Board acts on the petition for declaratory order. If the Board should order a

hearing on the petition for declaratory order, it may be desirable to have a joint hearing in the two proceedings.

Very truly yours,

G. O. BASHAM
G. O. Basham
Chief Examiner
Hearing Examiners' Office

cc: Elkan Turk, Jr., Esq.
Renato C. Giallorenzi, Esq.

April 3, 1958

Mr. G. O. Basham
Chief Examiner
Federal Maritime Board
Washington 25, D. C.

Re: *Consolo v. Grancolombiana*—
Docket No. 827

Dear Mr. Basham:

This refers to your letter of April 2nd, stating that the above-mentioned proceeding has been suspended until the Board acts on the petition of Grancolombiana for a declaratory order. As I indicated in our telephone conversation this morning, we take the position that a complainant's statutory remedy under section 22 of the Shipping Act cannot be subordinated to a respondent's desire to procure declaratory relief on the same subject. We therefore renew with all possible emphasis our request that the complaint case be set down promptly for a prehearing conference, to be followed in due course by the full hearing which the

law requires. I will stop in your office in the next few days to discuss a specific date.

Very truly yours,

GEORGE F. GALLAND

cc: Elkan Turk, Jr., Esq.

Renato C. Giallorenzi, Esq.

Your File No. A17-15:060

April 4, 1958

Mr. G. O. Basham
Chief Examiner
Federal Maritime Board
Washington 25, D. C.

Re: *Consolo v. Grancolombiana*
Docket No. 827

Dear Mr. Basham:

I acknowledge receipt of your letter of April 2nd and a copy of Mr. Galland's letter of April 3rd.

I note the position which you have taken with regard to the pre-trial hearing, and I understand that you are of the opinion that the pre-trial hearing in the CONSOLO matter should await your disposition on the petition of Grancolombiana for a Declaratory Order.

Mr. Galland apparently does not agree with this conclusion and would like to discuss this matter with you within the next few days. It is my opinion that the position which you have heretofore taken is a sound one, but in the event Mr. Galland desires to confer with you, I would appreciate it if you would advise Messrs. Vaughn & Dougherty, Warner Building, Washington 4, D. C. so that they may represent me in opposing Mr. Galland's application.

I might mention, in passing, that I understand that an appeal is pending in the Bananas Distributors—Grace Line matter, which appeal will be heard in the Court of Appeals for the Second Circuit, and that is a further reason why there should be a delay in any pre-trial conference.

Very truly yours,

RENATO C. GIALLORENZI

April 8th, 1958

Chief Examiner G. O. Basham
Office of Hearing Examiners
Federal Maritime Board
5th and "G" Streets N. W.
Washington 25, D. C.

Re: *Consolo v. Grancolombiana*
Your Ref: A17-15:060 Docket #827

Dear Mr. Basham:

I have noted copies of the letters to you from Mr. Galland and Mr. Giallorenzi, dated March 31st and April 2nd, 1958, respectively, your letter to Mr. Galland, dated April 2nd, 1958, and Mr. Galland's reply, dated April 3rd, 1958. I am writing to advise that May 5th, 6th or 7th, or any day during the week of May 12th would be convenient to me and my associate, Elias Rosenzweig, Esq., to attend a prehearing conference in Washington on behalf of Panama Ecuador Shipping Corp.

A comment or two regarding Mr. Galland's letter of April 3rd would seem to be in order. It is our understanding that the petition of Grancolombiana seeking declaratory relief in the premises, was filed earlier than the complaint in the above proceeding, and is equally statutory in its foundation as is the complaint herein, since it is authorized by §5(d) of the Administrative Procedure Act. There

would seem to be no cause to depart from the general principle that the Board has the discretion to control the progress of all proceedings pending before it, taking into account, where appropriate, the relationship between separate pending actions.

I also note that Mr. Galland's letter refers to *ex parte* telephonic representations regarding his position which have already been made, and predicts that an *ex parte* oral application will be made at your office at an unspecified date to consider a specific date for a prehearing conference. We do not consider *ex parte* representations and applications to be appropriate under either the Shipping Act or the Administrative Procedure Act. Such practice gives the other parties no opportunity to present their positions, either as to legal right or personal convenience. We earnestly urge that all future communications with the Board or the Office of Hearing Examiners be in writing, with copies to all parties in interest. We definitely desire to be heard on the choice of a prehearing date.

Next, I would respectfully call your attention to the pendency in the United States Court of Appeals for the 2d Circuit, of the petition of Grace Line, Inc., dated October 18th, 1957, to review the decision of the Board in *Banana Distributors, Inc., et al. v. Grace Line, Inc.*, dockets 771 and 775. Since the decision in that case may have a bearing on the determination of what are the significant issues in the instant case, it would seem to serve the interests of the Board and the parties to suspend all proceedings with respect to both Grancolombiana's petition for a declaratory order and Consolo's complaint until the decision of the Court of Appeals is announced.

Finally, I would comment on the sudden appeal for hasty disposition reflected in Mr. Galland's letters. We know that Mr. Galland has just emerged from an 8-week subsidy hearing. We submit, however, that his inability during that long period to attend to matters in docket 827 does

not justify the Chief Examiner in disregarding the convenience of other parties now that Mr. Galland is at liberty and of an inclination to proceed in haste.

Yours very truly,

ELKAN TURK, JR.

Cc.: Renato C. Giallorenzi, Esq.,
50 Broad Street
New York 4, N. Y.

George F. Galland, Esq.,
Galland, Kharasch & Calkins, Esqs.,
1413 K Street N. W.
Washington 5, D. C.

Order

At a Session of the Federal Maritime Board held at its office in Washington, D. C., on the 1st day of May 1958.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S. A.—CARRIAGE OF BANANAS FROM ECUADOR TO THE UNITED STATES

WHEREAS, Flota Mercante Grancolombiana, S. A. filed a petition requesting the Board to issue, after full hearing, a declaratory order determining the validity of contracts between it and Panama Ecuador Shipping Corporation and Grand Shipping Inc., for movement of bananas from Ecuador to the United States in the light of the decision of the Board of April 29, 1957, in *Banana Distributors, Inc. v. Grace Line, Inc.*, Docket No. 771 and *Arthur Schwartz v. Grace Line, Inc.*, Docket No. 775; and

WHEREAS, There is currently pending before the Board a proceeding based on substantially similar issues of law and fact, namely Docket No. 827, *Philip R. Consolo v. Flota*

Mercante Grancolombiana, S. A. and Panama Ecuador Shipping Corporation; and

WHEREAS, The Board having considered said petition, and good cause appearing,

IT IS ORDERED, (1) That the petition of Flota Mercante Grancolombiana, S. A. requesting the Board to issue, after full hearing, a declaratory order determining the validity of contracts between it and Panama Ecuador Shipping Corporation and Grand Shipping Inc., for movement of bananas from Ecuador to the United States in the light of the decision of the Board in Dockets Nos. 771 and 775 be, and it is hereby, granted; (2) that such hearing be held before an Examiner of the Board's Hearing Examiners' Office at a date and place to be determined and announced by the Chief Examiner, to receive evidence for determining the validity of the contracts described above; and (3) that hearing herein ordered be consolidated with Docket No. 827, *Philip R. Consolo v. Flota Mercante Grancolombiana, S. A. and Panama Ecuador Shipping Corporation*, for hearing and report.

By the Board.

(sgd.) GEO. A. VIEHMANN
Assistant Secretary

(SEAL)

FEDERAL MARITIME BOARD
WASHINGTON 25, D. C.

August 4, 1958

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Notice of Consolidation and of Hearing

Notice is hereby given that this proceeding will be consolidated for purposes of hearing with Docket No. 827, *Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.*, and Docket No. 835, *Flota Mercante Grancolombiana, S. A.—Carriage of Bananas from Ecuador to the United States*, and that hearing in the consolidated proceedings will be held before the undersigned beginning at 10 o'clock a.m., September 22, 1958, in Room 705, 45 Broadway, New York, N. Y.

A recommended decision will be issued.

C. W. ROBINSON
C. W. Robinson
Presiding Examiner

FEDERAL MARITIME BOARD
WASHINGTON, D. C.

Docket Nos. 827, 835

PHILIP R. CONSOLO,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.,

and

PETITION OF FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Docket No. 841

BANANA DISTRIBUTORS, INC.,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.,

Respondent-petitioner, Flota Mercante Grancolombiana, S. A., moves, pursuant to Rule 7 (e) of the Board's Rules of Practice and Procedure, for an order postponing the hearing date heretofore fixed in the above-entitled proceedings from September 22, 1958 at 10 A. M. in Room 705, 45 Broadway, New York, N. Y. to December 1, 1958 at 10 A. M. in Room 705, 45 Broadway, New York, N. Y.

Dated: New York, N. Y.

August 8, 1958.

Respectfully submitted,

RENATO C. GIALLORENZI,
*Attorney for Respondent-
Petitioner,*
26 Broadway,
New York 4, N. Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

RENATO C. GIALLORENZI, being duly sworn, deposes and says:

That I am the attorney for the respondent-petitioner, Flota Mercante Grancolombiana, S. A., in the above-entitled proceedings.

That by notice dated August 4, 1958, the respondent-petitioner was advised that the hearing in the consolidated proceedings entitled Docket No. 827, Philip R. Consolo v. Flota Mercante Grancolombiana S. A. and Docket No. 835, Flota Mercante Grancolombiana, S. A. Carriage of Bananas from Ecuador to the United States, which had heretofore been scheduled for a hearing on September 22, 1958 in Room 705, 45 Broadway, New York, N. Y., would be heard simultaneously with Docket No. 841, Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S. A.

That the Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S. A. proceeding, Docket No. 841, was instituted by the service of a complaint on the respondent-petitioner on July 21, 1958. That the said complaint heretofore filed in that proceeding has not been answered by the respondent-petitioner inasmuch as there is now pending before this Honorable Board an application for a bill of particulars in that proceeding.

There is likewise pending before this Honorable Board an application for a bill of particulars in the proceeding entitled Philip R. Consolo v. Flota Mercante Grancolombiana, S. A. Docket No. 827.

That both in Docket No. 827 and Docket No. 841, the various complainants are seeking reparations, among other relief, in the sum of \$600,000.00 each. In order to properly defend the proceeding instituted by Banana Distributors Inc. against the respondent-petitioner, Flota Mercante Grancolombiana, S. A. (Docket No. 841), it will be neces-

sary for the respondent-petitioner to investigate and prepare fully its defense against the claim made by Banana Distributors, Inc. in the complaint which it has filed against respondent-petitioner.

That inasmuch as respondent-petitioner's answer has not been filed in that proceeding, nor has any ruling been made on respondent-petitioner's application for a bill of particulars in Docket Nos. 827 and 841, it will be impossible for the respondent-petitioner to adequately prepare a defense to both proceedings.

That in Docket No. 827 the respondent-petitioner advised this Honorable Board that the demand for a bill of particulars had not been made sooner in view of the fact that the Board had not ruled until June 23, 1958 that it would try the issues of reparations at the same time as the issues of common carriage. Since it is essential to obtain a bill of particulars in not only the Consolo proceeding, Docket No. 827, but also in the Banana Distributors, Inc. proceeding Docket No. 841, the respondent-petitioner cannot properly prepare its defense to not only the issue of common carriage, but also the issue of reparations. To compel the respondent-petitioner to proceed with these hearings on September 22, 1958 would gravely prejudice its rights, especially in view of the seriousness of the issues raised in these matters and also because of the heavy damages which both complainants are seeking against respondent-petitioner.

It is for the foregoing reasons that the respondent-petitioner requests that the hearings in all of the above-entitled proceeding be adjourned to DECEMBER 1, 1958 at 10 A.M. in Room 705, 45 Broadway, New York, N. Y.

The denial of this application would seriously prejudice the rights of the respondent-petitioner and this request for a short adjournment cannot in any manner be detrimental to the interests of the complainants in the above-entitled proceedings.

WHEREFORE, it is respectfully requested that the hearings in the above-entitled proceedings be adjourned to December 1, 1958 in Room 705, 45 Broadway, New York, N. Y.

RENATO C. GIALLORENZI

Sworn to before me this
8th day of August, 1958

LENORE SCALLEY

Notary Public, State of New York

No. 41-8778800

Qualified in Queens County

Cert. filed in New York Co. Clk.

Commission Expires March 30, 1960

FEDERAL MARITIME BOARD
WASHINGTON 25, D. C.

August 22, 1958

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S. A.—CARRIAGE OF
BANANAS FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Notice of Postponement of Hearing

Hearing heretofore scheduled to be held herein before the undersigned beginning at 10 o'clock a. m., September 22, 1958, in Room 705, 45 Broadway, New York, N. Y., is hereby postponed to November 3, 1958, at the same hour and place.

C. W. ROBINSON

C. W. Robinson

Presiding Examiner

1

Wednesday, May 7, 1958

Prehearing Conference

* * * * *

19 * * * In the preceding two cases, 717 and 771 and 775, the legal or factual issue of common carriage was tried separately from the damages. We intend to be very brief on the common carrier issue. It's not going to take us very long, assuming we get this information here that we have requested to put in our evidence on that issue and we would propose to proceed right away, as part of our direct case, to damages.

We feel the law is clear enough now that there is no saving of time to anyone in trying to separate the cases, as the other cases have been split, so we could offer a rough case of a day—say a day and a half, maybe—for our direct case, including both the damages and the common carriage issue.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

4 Examiner Robinson: As far as I am concerned we can start now with 827, unless someone has an objection?

Mr. Giallorenzi: I have an objection to that, Mr. Examiner. I think we should first offer proof on the petitioner's declaratory order, which Grancolombiana filed on or about October 30, 1957, and which was filed before any complainant I think at least a month-and-a-half before Consolo filed his complaint in this proceeding which is now being heard, and I feel that we take precedence, we took initiative in starting, initiating these proceedings, that the proof which we will offer should be heard first, I think for the sake of good order, it is logical that the proof which we offer on our declaratory order matter be considered, at least received first, and then claims for reparations can follow immediately after that.

Examiner Robinson: Anyone have any comment?

Mr. Kharasch: We object to it, Mr. Examiner. Mr. Lippman is just checking—

Mr. Lippman: I object, Mr. Examiner, at the first pre-hearing conference held in Washington last May this very matter was discussed, and it was agreed at that time that we would proceed first. I'm trying to find the—

Mr. Kharasch: We have prepared our case.

Mr. Lippman: Trying to find that in the minutes which confirms that.

5 Mr. Kharasch: We prepared our case and arranged for our witnesses on the assumption that we were to proceed in the logical order of the complaint and the people who are complaining about the established order of things going first and matters of defense be offered later.

Mr. Giallorenzi: Can we have a moment to check that agreement?

Examiner Robinson: Certainly.

Mr. Lippman: Here it is, Mr. Examiner, page 15 of the pre-hearing transcript held last May, I made the following

comment: "Mr. Examiner, in view of the fact that we have a complaint procedure here, consolidated for hearing purposes with a declaratory order proceeding, I think it would be helpful to have them—to have a more complete understanding as to the procedure at the hearing. Are we to understand we are to proceed with our complaint, our direct case on the complaint case initially or before the petitioners in the proceeding involving the declaratory order will come forward with whatever they have to produce?" And, Mr. Examiner, you ruled, "I should think you would."

Mr. Giallorenzi: Where is that ruling?

Mr. Lippman: Page 16 of the transcript.

Mr. Kharasch: Would you like to see it? It would be most inconvenient for us to postpone the presentation of our case. We have a witness come from Washington and we have arranged for a witness to come from New York.

Examiner Robinson: Well, I think from the 6 practical point of view, seems to me that the respondent would come last, not because of the inferiority of the complaint, I don't mean that at all, but the fact that your position is going to be the same whether on offense or defense, and I should think the orderly procedure would be let the complainants put on their case, we don't have to go into reparations necessarily at the first, if you don't want to, because, basically, as to the merits of the case, because whatever you put in, is going to be ostensibly an answer to their complaint, anyway.

Mr. Giallorenzi: No question about that.

* * * * *

Examiner Robinson: I think it is conceded that there is no question as a matter of a few weeks precedence you had filed your petition. I don't think that necessarily should I would say outweigh what seems to be commonsense overall picture. You're not going to be prejudiced any way.

Mr. Giallorenzi: I don't know because I thought for the sake of good order I would like to have my proof go

in on this declaratory petition because we were the ones initiated these proceedings.

Examiner Robinson: That's very true insofar as one docket is concerned, but then you do have another complaint case and, as I say, whatever you put in is also going to be in the nature of your defense in the complaint case. Let's start ahead on the presentation, on the theory then, complaint action started.

* * * * *

8 **Leonard Morey**

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kharasch:

Q. Will you state your name and your business address, Mr. Morey? A. My name is Leonard Morey. My business address in 383 Lafayette Street, New York City, New York.

* * * * *

11 Q. Mr. Morey, you received a subpoena? A. Yes, sir.

Q. A subpoena served by the United States Marshal? A. Yes, sir.

Q. Addressed to Leonard Morey, president, Panama Ecuador Shipping Corporation, 22 East 4th Street, New New, New York. Now, where is your office in New York? A. That's the same building as 383 Lafayette Street.

Q. Never mind about that. Answer the question. Where is your office in New York? A. Where I make my business headquarters?

Q. Yes. A. 383 Lafayette Street.

12 Q. All right, and this is the same building 22 East 4th? A. Yes, sir.

Q. And you have your office in this building, right? A. Yes, sir.

Q. And you received this subpoena from the Marshal, is that right? A. Yes, sir.

21

Jose J. Borrero

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kharasch:

22

Q. And your occupation? A. Operating manager, acting general manager Grancolombiana (New York), Inc.

Q. What is the business of Grancolombiana, Incorporated, New York? A. General agent for Grancolombiana.

Q. What services does Grancolombiana offer which touch the United States? What different steamship services?

Mr. Giallorenzi: Please fix the time.

23

Q. At the present time. A. You want all coasts?

Or any particular coast?

Q. Briefly just name whatever you call the different services. A. Flota has service that runs from New York, Baltimore, Philadelphia, to west coast, South America as far down as Peru; another that run from New York, Baltimore and Philadelphia, east coast, Columbia, east coast Central America and Gulf Port, U. S. Gulf Port; and has another that runs from the Gulf Port of the United States, west coast, South America, as far down as Peru.

Examiner Robinson: In other words, you have two distinct services?

The Witness: Another, that runs from the U. S. Gulf Ports at the east coast, Central America, east coast, Columbia; another, that runs from Vancouver, U. S. Port, west coast, South America.

Q. Vancouver and the United States, west coast.

Examiner Robinson: When you say Vancouver, too, you mean Canada?

The Witness: Yes. Another, that runs from Vancouver, Canada, U. S. Ports, west U. S. A. Ports, west coast ports, Central America to east coast, Columbia. There is another service that—

Q. You say there is another service? A. There is
24 another service that run from the St. Lawrence River port that has a call in Boston, and that now goes as far down south as Peru, Columbia port, east coast, and west coast Columbia port. These are.

Q. Are you through? A. I think so.

Q. Approximately how many vessels does Grancolumbiana operate in these services altogether? A. Say about 35, roughly.

Q. Which Grancolumbiana services carry cargo between the United States and Ecuador, United States Atlantic ports and Ecuador? A. The one that run from New York, Baltimore, Philadelphia to west coast, South America, and Atlantic, you say, that's the only one.

Examiner Robinson: They serve all three American ports on each voyage, is that it?

The Witness: Yes, Baltimore, Philadelphia and New York.

Q. Let's take the service as it is presently operated, would you name again for the record the United States ports served? A. Baltimore, Philadelphia, New York.

Q. Are they served in that order?

Examiner Robinson: Which direction are you talking about now?

Q. Let's start the ship and say where do you con-
25 sider the service begins? A. In New York.

Q. All right. Begin in New York and please give the usual itinerary of the ships at the present time? A. New York, Buenaventura.

Q. What country? A. Columbia, Guayaquil and, that's in Ecuador, and then the Peruvian port.

Q. And then what happens to the ship? A. Come back.

Q. Along the same route? A. Along the same route.

Q. From Peruvian ports? A. Through ports.

Q. Ecuador ports? A. Manta, Bahia. Then Buena-ventura, Philadelphia, then Baltimore, and then New York.

Q. In Ecuador these ships call at Guayaquil? A. Yes, they do.

Examiner Robinson: How do the ships get to Philadelphia, through the canal?

The Witness: Through the canal, yes.

Q. With what frequency do you operate the services you—we're talking about?

Mr. Giallorenzi: Please fix the time.

26 Q. At the present time. A. Weekly, frequency.

Q. With what frequency was the services operated in 1957, last year? A. Same frequency.

Q. 1956? A. The same frequency.

Q. In 1955? A. The same frequency.

30 Q. Approximately how long does it take for the ships presently in this service to come from Ecuador to Philadelphia? A. About eleven days.

35 Q. Grancolombiana is a member of the conference number 3302, and has been since November 1955, is that correct? A. This is the same one here?

Q. Yes, sir. A. Yes.

40 Q. And bananas are regularly carried from Guayaquil? A. Yes.

59 **Alberto Sanchez**

was called as a witness and, having been first duly sworn, was examined and testified as follows:

64 Q. Is all that refrigerated space in one hold? A. In one hold. In Hold No. 3, divided in three different sections, upper tween, lower tween deck and lower hold.

70 Q. If you will look at Exhibits 13 and 14. In Exhibits 13 and 14 we are looking at the side ports, one on one side and one on the other, correct? A. Yes, sir.

Q. Is cargo discharged from both sides, both side ports simultaneously? A. No, only from one port.

Q. It's loaded through both? A. Loaded through both sometimes, yes.

74 Q. Now, when the ship is unloaded in Philadelphia, and Philadelphia is the place where most bananas are unloaded? A. Yes, sir.

Q. I mean, where bananas are usually unloaded? A. Yes, sir.

Q. When the ship is unloaded what is the first thing which happens, what's the first operation? A. Well, in this matter, in my testimony, I can tell you only what I can see, because I don't take any charge of these operations.

Q. You are not in charge of the stevedoring? A. No, sir.

Q. Who would be in port, Captain, in charge? A. In charge of stevedoring, no one in Grancolombiana is. The shipper takes charge of the stevedoring.

108 **Jose J. Borrero**

119 Cross-Examination

By Mr. Blackwell:

120 Q. Mr. Borrero, could you tell me, if it is within your knowledge, when Grancolombiana first carried bananas northbound from Ecuador to North Atlantic ports of the United States? A. Yes.

Q. What year was that, sir? A. Let me see if I have some information.

Mr. Giallorenzi: This is off the record.

Examiner Robinson: Off the record.

(Off-the-record discussion)

The Witness: You say from Guayaquil?

Q. Guayaquil, any other ports in Ecuador? A. In the Ecuadors, 1950, February, 1950, about February, 1950.

Mr. Blackwell: Mr. Giallorenzi—

Mr. Giallorenzi: Yes?

Mr. Blackwell: —just off the record you suggested that he had a document which indicates the names of the shippers that carried bananas, that carried for Grancolombiana. Is that in such a state that it can go into the record, Mr. Giallorenzi, would you like to—

Mr. Giallorenzi: Yes, it was prepared by Mr. Kritzler in obtaining the history of the transportation of 121 bananas by Grancolombiana vessels. August, 1949, July, 1955, and it was prepared specifically for the purpose of assisting us in this matter here, and I have no objection to putting it in, it was dated September 18, 1957.

The Witness: May I say something?

Mr. Blackwell: Go ahead.

Mr. Giallorenzi: Go ahead.

Examiner Robinson: Yes, certainly.

The Witness: I mean that is certain reference and in that document this deals directly with the persons that behavior, shippers, that I don't think that is proper, relevant to the case.

Mr. Giallorenzi: By that he means, that there are certain people that didn't pay their bills, and we had to sue them.

Examiner Robinson: That's something you gentlemen will have to decide.

Mr. Blackwell: That is a company document. I wouldn't mind at all if it was handed to the witness, he can read over the names of the shippers, and the dates that the arrange-

ments were consummated and bananas actually shipped during what periods. A. I have here, Mr. Lewis A. Noboa, from Guayaquil. He ships from 1950, February, 1950 to March, 1951. In only one vessel, namely, De Quito.

Mr. Lippman: That was May, 1950?

The Witness: February, 1950 to March, 1952, excuse me, 1951. March, 1951. Again, from May, 1951 he continued shipping in the Quito and the Medellin. And
122 I believe it was consecutively, two vessels. Now, in August, 1952, he was still with this Quito, Medellin, but then Manizales, and this Barquisimeto, and that thing finished in 1954, about February, 1954.

Mr. Lippman: This is still Mr. Noboa, the only shipper?

The Witness: Yes, so far. From Guayaquil.

Examiner Robinson: Let me ask, did he have a contract or did he ship as common carrier?

The Witness: No, he had contract, made with the principals in Bogota, we acted here only as agent, you see. In 1951 Flota Mercante Grancolombiana made an agreement, a contract, with Mr. Hans Tobisson. That was assigned to the Ocean Commercial and Development Company of Haiti, of Haiti.

Q. What year was that? A. About April or May, 1951. The contract was originally made for transportation from Santa Marta to New York.

Q. Excuse me, Santa Marta? A. In Colombia. But in February, 1952 a supplementary agreement which was made, which provided for the use of this Barquisimeto, from Guayaquil to New York. In March and April, 1953 there were four shipments, trial shipments made from Guayaquil to New York by West India Fruit Company.

Mr. Kharasch: West India?

The Witness: Fruit Company of Miami. And then I believe that from February or—from 1954, 1955 we
123 didn't carry any bananas from Guayaquil, there was a lapse of time, never carried.

Mr. Lippman: Excuse me, could you read back that last answer?

(Last answer repeated by the reporter.)

Q. So, Mr. Borrero, at least three shippers since 1950, Mr. Noboa, Hans Tobisson, and the West India Fruit Company have transported bananas on your vessels from Ecuador to the United States, North Atlantic ports, is that right? A. That's right.

Q. Now, and I presume that in all three instances those bananas were transported under contract arrangement? A. Special arrangement.

Q. Now, during that four-year period were any of these contractors or lessees of the space on the same vessel or did they actually ship on— A. There never have been more than one on each vessel.

Q. Now, has Grancolombiana since 1950 executed contracts with other shippers for the carriage of bananas from any other areas of the Caribbean or South America to North Atlantic ports? A. Yes.

Q. Could you give me those, please? A. I think he can give you.

Mr. Giallorenzi: I have the agreement here, Mr. Blackwell, if you would like to have them?

124 Mr. Blackwell: I really don't, if you can hand them to the witness, read them out, be very happy to have them done that way. I don't really care to see them at this moment.

Mr. Giallorenzi: Did you say North Atlantic ports? I take that back, that is Gulf ports.

The Witness: Yes, that's Gulf ports.

A. (Continuing) I am going to answer him. From August 1949 to December, 1949 Mr. Alfredo Lizano Corporation, New York, made eight shipments from Santa Marta to Colombia to New York, Flota had entered with him into a one-year contract during this time, but only eight shipments were made, Maracaibo, Manizales—

Mr. Giallorenzi: Off the record a moment.

Examiner Robinson: Off the record.

(Off-the-record discussion)

A. (Continuing)—Panama Fruit Company and American Fruit Company, Los Angeles, in October, 1949, he made trial shipments, arranged through the Guayaquil office of Flota, for eight shipments of bananas from Guayaquil to New York, in Ci-Mac-1 type vessel. In April, 1950, Mr. Dangond Fernandez, and De Castro, of Santa Marta, Colombia, made trial shipments, which preceded a formal contract, dated August 1, 1950, for six months. And covered were the vessels Maracaibo and Manizales. About seventeen shipments were made in these two vessels from April, 1950 through January, 1951, and that finished that transportation. I think that's all, because I already mentioned Hans Tobisson agreement.

125 Q. So I think it would be fair to summarize your testimony that between the dates of 1949 to the present, Grancolombiana under contracts or so-called trial shipments carried bananas from either Colombia, Ecuador to the United States, North Atlantic ports for seven shippers?

Mr. Giallorenzi: Not at the same time.

A. This is No. 7.

Q. All right.

Examiner Robinson: Whatever the record shows is the number.

The Witness: Okay. Six.

Q. And the present shipper? A. Seven.

Q. Now, Mr. Borrero, during any of that period did any of the, did any vessel of Grancolombiana carry for more than one shipper? A. No, sir.

Q. I take it that Grancolombiana first carried bananas from Ecuador to the United States, North Atlantic ports, in 1950, is that right? A. No. From Ecuador, 1950, but

first time carried Santa Marta, in accordance with this information in 1949.

* * * * *

126 Q. I would like to clear up the problem on the Grancolombiana bill of ladings. Now, forgetting for the moment any overstamp on bills of lading, we will get to that later. Is the bill of lading issued for the carriage of bananas in northbound carriage of bananas similar to the bill of lading that Grancolombiana issues to its southbound service? A. It is.

Q. Except for the overstamp? A. Except for the overstamp.

Q. And it would be, likewise, similar, would it not, to all bills of lading in this trade that Grancolombiana issues for the carriage of all dry general cargo, is that right? A. Well, I haven't had a chance to see anybody else's bills of lading.

Q. Grancolombiana bills of lading, with the exception of the overstamp, the bill of lading issued for the carriage of bananas is identical with that that Grancolombiana issues for the carriage of general cargo in both directions, is that right? A. I think I answered that in the affirmative, yes, I believe so.

* * * * *

127 Q. Mr. Borrero, do you know when that overstamp was first inserted, or stamped on bills of lading?

A. In this particular one?

Q. Well, I presume that the overstamp has been the same, not been changed? A. Yes.

Q. When was it first used? A. I don't particularly remember exactly, when it started, I have seen that long ago, with all this agreement, Tobisson, but exactly when, what particular transportation, I can't answer that.

Q. Do you think you can find out for me? A. I can try.

Q. Fine. I would like to know when that overstamp, and on the bills of lading, issued in every one of the

instances you have given me on the shipments of bananas by Grancolombiana, if you can find them? A. Yes.

128 Q. Now, can you tell me, sir, whether this or any other overstamp, similar to this, is stamped on any other bills of lading that Grancolombiana issues on any other commodity? Is the overstamp used for the carriage of any other commodity? A. This particular overstamp was issued, or is imprinted for the only purpose of bananas, I can't answer your question regarding any other transportation type.

* * * * *

203

Leonard Morey

having been previously sworn was recalled and testified further as follows:

Direct Examination

By Mr. Kharasch:

* * * * *

210 Examiner Robinson: In other words then your answer was you would have not taken less space provided somebody else was on there?

The Witness: That's right, we would take as much space as we could have.

Q. Now, that is your answer as of July 1955, correct? A. That's right.

Q. Now, on July 29, 1957, a new ship, the De Tunja arrived in the trade, would your answer be—what would your answer be as of July 29, 1957? A. My answer would be identical to the answer of the previous question.

Q. You would not share it? A. Would not share it.

Q. How about after the Manuel? A. All those boats are the same class.

Q. How about after the new ships arrived? A. They are all in the same class.

Q. How about when all the ships in the new class arrived?

A. My professional opinion is that they are not designed for multiple carriage of refrigerated material.

* * * * *

215

Philip R. Consolo

was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lippman:

Q. Will you state your name for the record, Mr. Consolo?

A. Philip R. Consolo.

Q. Where do you reside? A. 4425 North Michigan Avenue, Miami Beach.

Q. Are you the complainant in Docket 827? A. Yes, I am.

Q. Are you Philip R. Consolo who was the complainant in Docket 717? A. Yes, I am.

Q. What is your occupation? A. I am a banana importer.

Q. How long have you been engaged in the importation of bananas? A. I would say in the neighborhood of about 15 years.

Q. During that time have you been connected with several importing ventures? A. Yes, I have.

216 Q. What was the first such venture? A. The first such venture was exporting bananas from the Republic of Haiti.

Q. You said exporting, you were importing bananas, but you originated in the Republic of Haiti? A. Yes.

* * * * *

217 Q. What was your next banana venture? A. With the Dominican Republic.

* * * * *

Q. Now, the next venture? A. I went to export bananas from Ecuador on privately chartered vessels which were referred to as Corvette's.

Q. When did that take place, Mr. Consolo? A.
218 I believe in 1945, I don't want to be held to the exact date, in that area, 1945.

Q. Where were they received in the United States? A.
In Port Everglades in Florida, that is the Miami area also.

Q. What volume did you ship on these Corvette's? A.
Their capacity I believe was about eight to ten thousand stems, varying on the size of the stems.

Q. Why was that discontinued? A. Because the ships were not suitable for transporting these bananas and we had quite a bit of difficulty in the refrigeration and we had several cargos come in in a ripe condition.

Q. The refrigeration facilities on the ships then were not suitable, is that correct? A. Correct.

Q. Now, your next venture? A. I went back to Haiti, I received an exclusive franchise for the Republic of Haiti for the northwest division of Haiti to export bananas.

Q. When did that take place? A. Sometime in '46, if my memory is correct.

Q. What volume of bananas were imported under that arrangement? A. I would say at least a million stems
219 a year, in that neighborhood, more or less varying from week to week.

Q. Which was the port of entry? A. The port of entry was Miami again at this time.

Q. How long did that operation continue? A. That operation I believe continued for—we had a franchise for 8 years for about two or three years, then the government changed, Estime was the President of the Government of Haiti, the Government changed and the new Government wanted the franchise back and bought us out.

Q. What type vessel did you use in that operation? A. Privately chartered vessels of gross tonnage I say between four and five hundred tons with a carriage of 225 ton.

* * * * *

Q. What was your next banana importing venture? A. My next banana importing venture at that time was pretty dormant, just buying and selling bananas.

Q. Then what was your next venture in chronological order? A. My next venture was at the time I commenced shipment on the Grace Line ship which I believe was September of 1953.

Q. Where do you obtain the bananas you are now importing? A. From Ecuador.

Q. Is it possible for you to obtain bananas in suitable bananas for consumption in the United States in substantial volumes anywhere else? A. Not at the present time.

Q. Why is that? A. Well, generally referred to in the trade, United Fruit Company and Standard Fruit Company are the major factors, they seem to have control of any large quantities or production I should say of bananas that are grown in Central America and Caribbean areas there is very little independent fruit to the best of my knowledge.

Q. By the term independent, what do you mean? A. The word independent in the trade is referred to fruit that is not owned from United or Standard, that is on an open market to go into a country and be free to negotiate to purchase it. That is what I mean by independent fruit.

* * * * *

223 Q. Was the Grace Line operating a regular scheduled weekly service at that time? A. On their passenger ships, yes.

Q. On their freighter vessels? A. Approximately a fortnightly service.

Q. What about the Chilean Line? A. The Chilean Line to the best of my knowledge because I never inquired for space in the Chilean Line was a fortnightly service, but not regular and they would stop off at intermediary ports where there would be no definite date of arrival in the United States, it could be 10, 11, 12, 13, 14 days they could stop or off Buenaventura, Havana, then come to whatever

port was designated for bananas, that is my knowledge of it.

Q. Isn't it important to your business, Mr. Consolo to have a service that operates a regular weekly basis? A. Yes, it is.

Q. Will you explain why it is important? Let me ask you this question. Is it important from the standpoint of obtaining fruit to export? A. Yes.

Q. In what respect? A. Well, most farmers, producers, brokers that you deal with in Ecuador like
224 to sell bananas every week, especially a man who owns his own plantation, he has to cut his fruit every week to keep his farm in good condition, so when you go to speak to someone there to sell you bananas in Ecuador, the first question they eventually ask you, "are you going to ship on weekly service?" So you—if you have a weekly service to ship bananas from Ecuador, your chances of making deals with farmers or brokers are a much more advantageous position than if you did not have a weekly service.

* * * * *
225 Q. Are you importing bananas into the United States on the Grace Line vessels at the present time?
A. Yes, I am.

* * * * *
227 A. Well, in order to have fresh fruit and to have the fruit on time for the ship rather than to let it lay there for one day so that if it lays there for argument sake in Puna waiting for the ship, naturally you will have a larger percentage of ripens when you come to the United States, because of the heat that fruit has received while laying there waiting to be put in refrigerated chamber.

Q. Are cutting orders sent out to growers? A. Yes.

Q. How far in advance of the vessel sailing? A. Generally it all depends in the areas you are cutting fruit from, it should be at least two or three days, the cutting orders

before the arrival of the ship at Guayaquil. It gives you an opportunity to send your barges up to the plantations where the fruit is being cut, placed on the barges, come down the river to meet the mother ship.

Q. Mr. Consolo, at page 4 of the report in Banana Distributors, Inc., Services Grace Line Docket 707 and 228 771 and 775, the board found and I quote, "Growing, shipping and marketing of bananas due to the nature of the commodity it requires a careful synchronized operation. Bananas grow rapidly and once cut from the plants are subject to rapid ripening. A shipper requires an assured amount of space in order to properly integrate his entire operation. There are no shore side refrigerated warehouses in Guayaquil and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of over ripe for sikatoga diseased bananas, such bananas could adversely affect otherwise, 'healthy' bananas. Each shipper strives to have his fruit reach their destination as green as possible." Is that a fair summary of the facts of doing business in Ecuador?

A. Yes, you could say that.

Q. Is it true at the present time? A. Yes.

* * * * *

229 Q. Do you consider yourself competitively disadvantaged by reason of the fact that you only have one arrival a week as compared with United Fruit, Standard Fruit and even as compared with Panama Ecuador Shipping Company?

Mr. Giallorenzi: I renew my objection.

Examiner Robinson: I overrule your objection. That he can speak from his own opinion.

The Witness: From my point of view, I think I am at some disadvantage by not having two arrivals a week where other companies in a competitive field have two arrivals or more per week.

* * * * *

264 Q. You are presently shipping on the Grace Line?

A. Yes.

Q. How much space do you control? A. Presently?

Q. At the present time. A. About 19,000 cubic feet.

Q. Have you always held that same amount of space on the Grace Line? A. No, I did not.

Q. How much space did you previously control?

265 A. Prior to '57?

Q. When in 1957? A. October, 1957.

Mr. Giallorenzi: What date in October?

The Witness: I think it is the 11th. I think that was the change of the new contract, the 11th of October.

Q. Go ahead. A. From September, 1953 to November, 1953 I held about 18,900, I believe, cubic on the passenger ships of the Grace Line, and from November, 1953 to October 11, 1957 I held 18,900 cubic feet on the passenger ships and about 25,800 on the freighter ships, which was on a fortnightly service.

Mr. Giallorenzi: Was that 20,000?

The Witness: No. 18,900 on the passenger ships and about 25,800 on the freighters.

Q. How much space was taken away from you then in October of 1957, Mr. Consolo? A. I would say about 25,700 cubic fortnight. They didn't have a regular service. Now the freighters do have a regular service. I remained with about the equal cubic that I had on the passenger, about 18,900.

Q. How much space did the Board find you to be entitled to in Docket 717, Mr. Consolo? A. Forty thousand cubic weekly.

* * * * *

267 Q. Will you first give us a description of the refrigerated chambers on the Grace Line, first on the Grace Line passenger ships, and then on the Grace Line freighters? Let us take the passenger vessels first, Mr. Consolo. A. Well, the passenger vessels, I believe there

is three holds for carriage of bananas, or hatches, and each hatch represents two chambers.

Q. Can you identify the hatches which carry bananas, Mr. Consolo? A. I think they are 2, 3 and 4.

Q. Hatch by hatch, who were the shippers as of October, 1957 on the passenger ships? A. On the passenger ships?

Q. Yes. A. We will start with 2. On lower tween deck to, I believe was the Swanee Fruit and Steamship Company with three-fourths of a chamber. Stanley Grayson in the chamber with one-quarter. On upper 2 was Compania Frutera Sudamericana.

Examiner Robinson: Off the record.

[Discussion off the record]

268 The Witness: Where were we up to?

Mr. Giallorenzi: You finished hatch 2.

A. Upper 3 was Mr. Noboa, Louis A. Noboa. On lower 3, Compania Frutera. On upper 4, Compania Frutera, and on lower 4 I believe it was Samuel Staff.

Q. Morey and Staff? A. Yes. I believe that's the way the contract was written, I don't know exactly. The other half of the chamber lower 4 was given to Lebantino.

Q. Would you care to refresh your recollection by referring to a list? A. Well, I will.

Q. To summarize, Mr. Consolo, speaking as of October, 1957— A. Yes.

Q. [Continuing] —will you name the shippers on the passenger vessels and the amount of space each shipper controlled? A. On the passenger ships?

Q. On the passenger ships. A. Frutera, three chambers, Noboa, one chamber, Swanee Fruit and Steamship and Grayson, one chamber.

Mr. Kharash: Together.

Q. How much did Swanee— A. I stated that before.

Q. They had three-quarters? A. Three-quarters.

269 Q. And Grayson had the other quarter? A. Yes.

Q. Go ahead. A. Morey and Staff, one-half and Lebantino, one-half.

Q. The total is six chambers? A. Six chambers.

Q. On the passenger ships? A. Yes.

Q. Let us take the freighters, Mr. Consolo. A. Yes.

Q. As of October, 1957, who were the shippers on the freighter ships, Grace Line freighters? A. You want me to identify how many chambers?

Q. Please identify the shipper and the number of chambers that he controlled. A. On the freighter ships there are four chambers, and hatch 2 and 4, upper and lower tween deck. On upper 2 in 1957 I. B. Joselow was the shipper on that chamber. In lower 2 it was the West Indies Fruit with one-half chamber. J. Marto, known as Martin Associates, one-quarter chamber, and one-quarter chamber I believe was Turino.

* * * * *

273 Q. When did you first approach the Grancolombiana Line for space on their ships?

Mr. Lippman: Let me ask you this question.

Q. [Continuing] Did you have any negotiations with Grancolombiana for space on their vessels in 1954?

* * * * *

274 A. I believe it was some time in 1954 that I called Grancolombiana Line with reference to some trial shipments on their ships.

Q. Go ahead. A. And we couldn't get along on the rate and that was the end of it at that time, in '54.

Q. Was Grancolombiana Line operating a regular weekly service in the trade at that time? A. Not to my knowledge.

Q. When was your next approach made to Grancolombiana Line, Mr. Consolo? A. I believe it was in the spring of—when did the present contract start, the first contract?

Q. I believe it was in July of 1955. A. Then it was in the spring of 1955.

Q. With whom did you discuss the matter of space, Mr. Consolo? A. With Mr. Borrero and Mr. Penaranda.

Q. Did you meet with these gentlemen? A. At first I

spoke to them on the phone and requested a meeting with them, and they granted a meeting, and we met at the
275 Grancolombiana office in New York City.

Q. When was this meeting? A. In the spring of 1955.

Q. What was the substance of your discussion with these gentlemen at that time? A. We discussed—trying to negotiate a deal for the transportation of bananas on the Grancolombiana ships from Ecuador to New York City.

Mr. Giallorenzi: Will you go a little slower, please?

The Witness: Okay.

Q. Continue. A. We went at length with reference to the holds—to the chambers on the Grancolombiana ships and I made inquiry as to the height of each chamber and then the rate that they were asking for the ships.

At this meeting I requested that I would like to see one of the ships, and the meeting was adjourned. I was to call the office and they were to let me know when one of the ships was in and be able to inspect it.

Q. Did they subsequently notify you when a ship arrived, Mr. Consolo? A. Yes, they did.

Q. Did you inspect it? A. Yes, I did.

Q. Was anybody with you at the time of your in-
276 spection, Mr. Consolo? A. I believe, if my memory is correct, Mr. Borrero was at the time—met me there.

Q. When did this inspection take place? A. Maybe a week or two weeks after the first meeting, or it may have been sooner or later.

Q. Did you have any discussion with Mr. Borrero aboard the vessel at that time? A. I think the only thing I discussed with him was that the bottom chamber was too high. The height was too high, it was not proper for carrying bananas and that I would call the office for another meeting.

Q. What do you mean by the chamber being improper or not having sufficient height for the carriage of bananas? A. I would say it was too much height for the carriage

of bananas. That it is not proper to store bananas twelve foot high or eleven feet six inches, which some of these chambers were, because if you stand three and lay one your bottom hands will get all crushed by the time they arrive in New York, so that you would have a larger percentage of what, we would call, maybe specials or rejects or crushed fruit that you would have to sell at a reduced price.

I told him it was not proper to carry bananas at that height or practical.

Mr. Blackwell: May I interrupt you for a second?

Will you give us the name of the ship?

277 The Witness: I don't remember. It was one of the typical ships.

Q. Of the space in the lower chamber, approximately what amount would be lost to you in stowage of bananas? A. About 25 per cent.

Q. Did you inform Mr. Borrero of this situation, Mr. Consolo? A. Not at the ship.

Q. Yes. A. We had a subsequent meeting.

Q. Let me ask you this, Mr. Consolo. Were you in the room during the time of Captain Sanchez? A. Yes.

Q. Did you hear him testify as to the vessels in the trade, with particular reference to the cargo space available in the lower hold for the stowage of bananas? A. Yes, I was here.

Q. Do you agree with his testimony? A. Yes, I do.

Q. On that point? A. Yes, I do.

Mr. Kharash: Could I clear up one point on the record, Mr. Consolo?

The Witness: Yes.

Mr. Kharash: You said the lower hold was not
278 proper for the carriage of bananas. As I understood your later testimony, did you not mean that 25 per cent of the space could not be used for bananas, but that bananas could be stacked two stems on end and one laid parallel on top?

The Witness: Let me qualify that. I wouldn't say it

cannot be used economically for the proper stowage of bananas, I mean I have known people to stack bananas twelve or eleven feet high, but your arrival condition would not be as good as if it was stowed eight feet or eight and a half feet high.

Mr. Kharash: I am directing your attention just to the word "proper". It was proper to carry bananas to some extent in the bottom?

The Witness: Yes.

Mr. Kharash: And the extent was 75 per cent of the capacity of the lower hold?

The Witness: Yes.

Mr. Kharash: Thank you.

Q. Did you have a subsequent meeting with Mr. Borrero? A. Yes. I did. With Mr. Borrero and Mr. Penaranda.

Q. What occurred at that meeting? A. At that meeting there I went into length with him that the bottom chamber could only be utilized from my standpoint of view about 75 per cent, and they gave me figures as to what they wanted for the ships in its entirety, and I agreed to take the ship in the entirety providing that they would
279 reduce from the rate offered me 25 per cent of the lower chamber only.

Q. Do you recall what the rates discussed were, what were the rates discussed at that time, Mr. Consolo? A. I believe for the Ciudad De Manizales, \$7,000, Ciudad De Quito, \$10,000, Ciudad De Medellin, \$13,000, Ciudad De Ibague, \$14,500, Ciudad De Cali, \$14,500.

Mr. Giallorenzi: I would like the record to show that the witness is reading from some document which I don't know what it is.

May I be told what document he is reading from?

Mr. Lippman: You may inspect it.

Mr. Giallorenzi: Will the record show that the witness was reading from a pro forma agreement of bananas, Flota Mercante Grancolombiana, S. A., dated July 1, 1955.

Mr. Kurrus: With whom, Mr. Staff?

Mr. Giallorenzi: No. That is just a pro forma, Mr. Kurrus.

Q. Did you make an offer to Mr. Borrero at that time, Mr. Consolo? A. At that time there?

Q. Yes. A. I am going back, just reciting from memory.

Q. Yes. A. I tried to calculate what the loss of the lower chambers that had this eleven to twelve feet high—
280 and make an offer to him.

Q. Go ahead. What was that offer? A. I don't remember the exact figures, but we came to a calculation in the office, and he told me that he would send a cable to Bogota with my offer. What the exact figures were, I don't remember, because we came to some calculation, how much was lost from the lower chamber only.

Then I gave him an alternative offer at the office at that time, that if they wanted to leave just the two upper chambers that I will take those two upper chambers at their figure, and I also talked about concessions for ten trips, for 75 per cent minimum of the freight rate to ship on ten trips.

Mr. Giallorenzi: Will you go a little slower, please, Mr. Consolo.

Q. Were the freight rates discussed at that time, Mr. Consolo, relating in any way to the amount of cubic space available in the ships? A. I don't quite understand that question.

Q. Were your computations based upon the cubic space available for the stowage of bananas in the ships? A. We only computed—I'll say again—the lower hold, the lower chamber, which had eleven and a half or twelve feet high, and I made my own computations as to what I wanted to pay just for that lower chamber and deducted it from the amount that he wanted for the ships.

281 The Witness: Do I make myself clear?

Q. Then, as I understand it, you were seeking a concession from the amount quoted by Mr. Borrero in the amount of one-quarter lost cubic on the lower chamber?

A. In substance that's what it was, the discussions were about.

Q. Did you submit an alternative proposition? A. Yes.

Q. What was that proposition? A. That if they did not accept my proposition in the entire ship, that I would take the two upper chambers at the rate that they wanted based on the amount of cubic on those two ships and break it down in dollars and cents as to what they were asking.

Q. When was this discussion held? A. In the spring.

Q. Some time in the spring of 1955? A. Yes.

Q. Did Mr. Borrero tell you that he would relay your offer to his principals? A. It was either Mr. Borrero or Mr. Penaranda who said that they would send a cable to Bogota and inform me.

Q. Were you subsequently informed by Mr. Borrero?

A. I think I spoke to either of the two gentlemen, I don't remember, by phone.

282 Q. What report did you receive? A. That they had rejected the offer.

Q. Would you have taken space at that time, Mr. Consolo, if it had been offered to you on the basis of the upper two chambers? A. Yes.

Q. Would you have taken space if it had been offered to you on the basis of the entire refrigerated space with allowance in the freight rate in the amount of 25 per cent of the total cubic available? A. Yes.

Q. In the lower hold? A. Yes.

Q. But you were willing to pay for the full cubic space available on the upper two holds, is that correct? A. Yes, I was.

Q. Would you have taken one of the two upper chambers if it had been offered to you at that time? A. Yes, I would.

Q. Did Grancolombiana Line make you any proposition with respect to the entire refrigerated space of the vessels—
A. No.

Q. [Continuing] —at that time? A. No.

Q. Did you have any subsequent meeting or discussions with any official of the Grancolombiana Line? A. Well, periodically when I used to come to New York, I used to call Mr. Borrero on the phone and told him that I would like—request the space on the ship again. He said they were going to come out with new bids when the present contract—prior to the present contract expiring, and that he would notify me to make a bid. So I believe some time—

Mr. Lippman: Let us take it chronologically, Mr. Consolo.

The Witness: Yes.

Q. These discussions that you testified a while ago took place in the spring of 1955? A. Yes.

Q. When did you learn that Grancolombiana Line had made a deal with some other importer? A. Some time in July of 1955. A new shipment was coming in Philadelphia on the Grancolombiana Line. I think I called Mr. Borrero and he said he had entered into a contract for two years on the ship going to Philadelphia, on the Grancolombiana ships.

Q. Did you make known to Mr. Borrero your continuing interest in the space? A. Yes.

Mr. Giallorenzi: I object to these questions. It is leading. I think—

284 Mr. Lippman: Mr. Consolo said on every trip he made to New York he called Mr. Borrero.

Q. When was the next occasion that you talked to Mr. Borrero?

The Witness: I didn't say every trip.

Mr. Lippman: Let me ask you this question.

Q. When was the next occasion when you discussed the possibility of obtaining space on the Grancolombiana vessels with Mr. Borrero? A. I think it was some time—later '55 or early '56.

Q. What were you told at that time? A. He told me they were under contract—prior to the contract expiring

they were going to request bids and that he would notify me.

Q. Did you keep in constant touch with Mr. Borrero?

A. Yes.

Q. When occasions permitted upon your arrival in New York? A. Right. Correct.

Q. In these discussions with Mr. Borrero did you discuss the possibility of taking space less than the entire ship?

Mr. Giallorenzi: I think this question is leading—I know it is a leading question.

Examiner Robinson: I agree with you.

Mr. Giallorenzi: I know the leading questions will save a lot of time, but I don't think you should put the
285 answers in the witness' mouth.

Q. Mr. Consolo, will you tell us whether during these discussions you talked about space on the—

Mr. Giallorenzi: I still object.

Examiner Robinson: It is the same thing.

Mr. Giallorenzi: What did you talk about?

Mr. Lippman: Thank you.

Q. What did you talk about? A. Mr. Borrero—I told him if he would give me the entire space I would be willing to take less.

Mr. Dougherty: When was this?

Mr. Giallorenzi: Wait a minute.

Q. What period was covered by these discussions with Mr. Borrero, Mr. Consolo? A. I can't pick the exact dates.

Q. Up through which date, how far along are we now? A. '56. I spoke to him maybe a few times in '56, then in '57 when I came in in January I spoke to him again, and he told me that he would send me a bid for the new contract.

Q. Did you subsequently receive an invitation from Mr. Borrero to submit a bid? A. Yes.

* * * * *

287 Q. Mr. Consolo, referring your attention to page 1 of Exhibit 25— A. Yes.

Q. [Continuing] —does that letter invite your bid with respect to all or a portion of the refrigerated space?

Mr. Giallorenzi: I will have to object to that, the letter speaks for itself.

Examiner Robinson: That is true.

Mr. Lippman: I will withdraw the question.

Q. Did you submit a bid to Grancolombiana Line by March 10th as invited? A. Yes, I did.

Q. Is page 2 of the exhibit a copy of the bid you submitted? A. Yes. I did.

Q. Did you bid on the entire refrigerated capacity of the vessels, Mr. Consolo? A. Yes.

Q. Would you have taken less?

Mr. Giallorenzi: I object to that question. The
288 witness just testified that he bid on the entire space of the vessel.

Examiner Robinson: That would not preclude him from saying he would take less.

Mr. Giallorenzi: I think now he has given his answer to the question, which answer implements an exhibit, a letter, which has been placed into evidence, and now I think he is trying to vary the meaning, not only of his verbal answer and the letter—

Examiner Robinson: That is not the way I understand it.

He said he asked for it all, and then he asked if he would have taken less.

Mr. Giallorenzi: That is what my understanding was, what the bid is. Now, I vigorously object to this.

Examiner Robinson: I see nothing wrong.

Mr. Lippman: His objection is overruled?

Examiner Robinson: Yes.

Q. Would you have taken less? A. Yes.

* * * * *
296 A. [Continuing] —I spoke to Dr. Dias on the phone. He was very disturbed over the letter. I said, the letter doesn't mean a thing if you are ready to give me space. He said, since your lawyer sent me a letter

I am turning over the whole matter over to my attorney, which I think is Mr. Giallorenzi. That is the last time I spoke to him or had any conversations with any officials of Grancolombiana Line.

Q. Mr. Consolo, has Grancolombiana Line refused to allocate to you space aboard their vessels at all times since November, 1955 to the present?

Mr. Giallorenzi: I object to the question.

Examiner Robinson: He is just asking him a question of fact.

Mr. Lippman: This is just to summarize the testimony so far. I think it would be helpful, a statement to that effect.

A. That is correct.

Q. Mr. Consolo, your complaint in this proceeding
297 requests an allocation of space to you in the amount of 50,000 cubic feet or such lesser amount as the Board should find to be fair and reasonable allocation?

A. Yes.

Q. Do you now require 50,000 cubic feet of space, Mr. Consolo? A. I would take 50,000 feet or less.

* * * * *
Q. How many stems could be shipped in 50,000 cubic feet of space? A. It depends on the size of the space.

Q. Approximately. A. And the height of the chambers, what you want to utilize.

Q. Can you give us a figure? A. An approximate figure?

Q. Yes. A. I'd say between 12,500 and 13,000 stems.

* * * * *
306 Q. Mr. Consolo, I show you a copy of Exhibit No. 10. A. Yes.

Q. —which is in evidence. A. Yes.

307 Q. —which purports to be a photograph of the refrigerated space aboard the Cartagena De Indias.

Examiner Robinson: Off the record.

[Off-the-record discussion]

A. Yes.

Q. Is that space desirable? A. Yes.

Q. Is it suitable for the carriage of bananas for more than one shipper? A. Yes.

Q. Is it suitable for the carriage of bananas on one level of more than one shipper? A. On a chamber, you mean.

Q. Yes. A. Yes.

Q. Do you see why two or more shippers could ship their bananas in a single chamber? A. Yes, sir. Two shippers could ship in one chamber.

Q. Would you be interested in shipping on the Grancolombiana Line on that basis, Mr. Consolo? A. I would, yes.

Q. I put before you, Mr. Consolo, Exhibits 14 and 13 which are in evidence. A. Yes.

Q. —showing the side ports on the upper tween 308 decks of the Cartagena De Indias. A. Yes.

Q. —which, as I understand, is the class of vessel now in service, and I ask you now whether that space appears to be desirable? A. Yes.

Q. How would you compare it with the space along the Grace Line vessels? A. You cannot tell exactly, but I would say it is comparable. I don't see much difference between the Grace from what I see on this photograph.

Q. Would you consider it as good as what is available on the Grace Line? A. Yes.

* * * * *

383 Cross-Examination

By Mr. Giallorenzi:

* * * * *

460 Q. And you know also of your own knowledge in addition to their testimony that the refrigerated space in the Grancolombiana vessels is suitable for bananas located in No. 3 hold? A. Yes.

Q. Upper tween deck, lower tween deck, and lower hold? A. Yes.

Q. And you also know that hold is served from side ports, port and starboard, upper tween deck? A. Yes.

Q. Those are the only two? A. Yes.

* * * * *

507 Q. Now, you subsequently ascertained that Grancolombiana had made arrangements and did enter into a contract with Morey and Staff for two years, isn't that right? A. Yes.

Q. When did you first learn that? A. Well, I first learned that from the banana trade, put it that way. Then secondly, I personally learned it from Mr. Staff, call me and we had many pleasant discussions, and he informed me at that time there was a contract existing between
508 himself and Morey and Grancolombiana Line.

Q. By the way, when did you first meet Mr. Staff? A. I don't know whether it was probably right after his first or second shipment, was in '55.

Q. And do you know him socially? A. Not prior to that.

Q. And this first meeting that you had with Mr. Staff, did you know where you met him? A. I don't remember, I think he called me at the St. Moritz Hotel, invited him down to have coffee, and talk, I think it was the first meeting, he probably kept notes.

Q. Do you know what you talked about? A. Just general business, nothing specific.

Q. Did you inquire to him about his contract? A. No, I think he voluntarily told me he entered into a contract with Grancolombiana.

Q. Did he show you the contract? A. No, he didn't show me.

Q. Did he tell you the terms? A. No, not that, just told me he had a contract with them, I didn't ask him.

Q. Did he tell you about the price he paid for it? A. I don't think so.

Q. He didn't tell you that? A. Not at that meeting, anyway.

509 Mr. Kharasch: Mr. Examiner, I had hoped we could progress faster that way, if we sat here quietly. I request that the Bench address Mr. Giallorenzi and ask him to stick a little closer to the facts relevant to the case, and not coffee at the St. Moritz.

Examiner Robinson: What is the purpose of it, Mr. Giallorenzi?

Mr. Giallorenzi: I am going to tie that in with certain other testimony, I think the issue of credibility has come into the fore at this particular point, and I want to tie that in with other proof that I am offering at a later time in this proceeding. So that we may take a look at this whole picture, the way—

* * * * *

609 Redirect Examination

By Mr. Kharasch:

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634 Q. There may be a hole in the record on this point, Mr. Consolo. Between 1955, July 1955, and March 1957, did Grancolombiana at any time advise you of the price being paid for space, or give you a chance for space on the ship at the price that was then being paid, the rate? A. I have never been advised as to what rate.

Q. The first time you saw the rate was in the papers in connection with this case, is that correct? A. I don't follow your question.

Q. When was the first time that you actually learned what rates Grancolombiana was collecting from its present shippers, and I show you Exhibits 15 and 16 which are the Grancolombiana contracts, and ask you if these contracts gave you the first information. A. As to
635 the exact amount paid?

Q. Yes. A. Yes, I believe the contracts were.

Q. The contracts are the only information you have? A. Of the exact amount.

Q. From Grancolombiana? A. Yes.

Q. Mr. Consolo, I believe on either direct, or cross-examination, you testified that when you talked to Mr. Borrero between 1955, and 1957, on your trips to New York that Mr. Borrero told you that the space was under contract, is that correct? A. Yes.

Q. Would you have taken space if it had been made available to you prior to the time the first Morey-Staff contract in 1957, that is between 1955 and 1957? A. Yes, I would have taken space.

* * * * *

655 Q. Mr. Consolo, prior to bidding on the Gran-colombiana space on March 6, 1957, or any time when you had these discussions with Mr. Borrero did you get to the point where you offered them any evidence of your financial ability, or stability? A. Never asked me.

656 Q. Never asked you? A. No.

Q. Isn't it a fact you were never asked because your offers were unacceptable, and there was no need to continue? A. To the best of my knowledge that is correct.

* * * * *

661 **Louis F. Meyer.**

being first duly sworn, testified as follows:

Direct Examination

By Mr. Lippman:

Q. Will you state your name for the record, please, Mr. Meyer? A. Louis F. Meyer.

Q. Where do you reside? A. 1664 Macombs Road, Bronx.

Q. In what business are you engaged? A. Well, I am a commission merchant, and broker.

Q. With what company are you affiliated? A. H. Dixon & Company.

Q. Are you an officer of that company? A. I am president.

* * * * *

662 Q. How long have you been associated with R. Dixon & Company? A. Since 1909.

Q. Who are the importers of bananas at R. Dixon & Company as represented at the present time? A. The International Banana Corporation, and Consolo, both relatives.

663 Q. You mean Philip R. Consolo? A. That's right, and Charles.

Q. His brother, Charles Consolo? A. That's right.

Q. How long have you been representing the Consolo brothers? A. Since October 21, 1957.

683 Cross-Examination

By Mr. Giallorenzi:

Q. Mr. Meyers—

Examiner Robinson: Meyer.

The Witness: Singular.

Q. Mr. Meyer, when did you become the commission agent for International Banana Corporation? A. In October 21, 1957.

Q. When did you become the commission agent, or account, rather for Novoa? A. Well, originally I was to take Novoa's account in October 21st, but I had permitted someone else to handle it. They didn't have enough fruit.

Q. They did not have enough fruit? A. That's right. The party who took it over.

Q. Who was that? A. Andes.

Q. Andes Fruit Corporation? A. That's right.

684 Q. How long did Andes Fruit Corporation act under Novoa? A. Since that time, October 21st.

Q. At the present time are you the agent for the sale of the Novoa bananas? A. That's right.

Q. When did you take this contract over again from Andes? A. Well, it was on these chartered boats; that's where I took it over.

Q. The regular Grace Line boats. Andes Fruit still acts as selling agent for Novoa? A. Part of it, yes.

Q. Part of it? A. Yes.

Q. Do you know who acts as selling agent for the other part of the Novoa fruit? A. I have an idea. I don't know definitely.

Mr. Kharasch: May we inquire as to the relevancy of investigating Mr. Novoa?

Mr. Giallorenzi: Yes. I want to find out how many shippers Mr. Meyer acts for, and I will tie it up with some other questions.

The Witness: Well, understand this international is the same as the Ecuadorian Banana Company prior to October 21st. See, it is the same owner. He has been shipping to me for 10 years, but he changed the name, see?

Q. Well, who is that? A. Mr. Josloe.

Q. Now, getting back to Novoa. At the present time are the regular Grace Line vessels, Andes Fruit Company acts as agent, selling accounts on some ships, and someone else acts on others? A. That's right.

* * * * *

688 Q. In other words, when you get an order, let us say from a customer in Chicago for 500 selects, and you have two or more similar shippers on one vessel, all giving you outturning select fruit, or at least part of it, you would put all of that fruit from one customer you designate to the jobber, or would you— A. (Interrupting) I would allocate.

Q. You would allocate? A. As a rule.

Q. As a rule you would spread it out? A. That's right.

Q. In other words, if you had an order for 500 stems of selects from, let us say, some chap in Chicago, you might take 200 from— A. (Interrupting) No, take one load, see a trailer constitutes about 250—275 bunches.

689 Q. Yes? A. So therefore if he wants two loads, I give one from Josloe, one from Consolo, one from Lovett, see?

Q. In other words— A. (Interrupting) I try to spread them out.

Q. You would allocate them from the various shippers? A. That's right.

Q. These jobbers then would be considered customers of R. Dixon, isn't that correct? A. That's right. They are not here, and they expect me to fill their orders.

Q. They are not customers of the shippers, or the importers? A. No.

Q. Definitely not? A. Oh, no.

Q. Do these customers, or jobbers, as I will call them know who the importers are? A. No. As a rule no.

Q. They wouldn't know whether they got their fruit from International, or Dover Banana? A. That is right.

* * * * *

700 Q. Let's say from all the source of supply, what percentage does United bring in the North Atlantic ports? A. I really didn't figure it out. I imagine they bring in 50%.

Q. And Standard? A. About 25%.

Q. And the balance, 25%, is brought in by? A. Grace Line.

Q. Grace Line, as I call them, the independents? A. That's right.

Mr. Lippman: I think the record should also show the importations of the Grancolombiana Line; that should be taken into consideration also.

The Witness: Yes, but I was only confining myself to New York.

* * * * *

702 Q. What percentage of bananas into the North Atlantic ports of the Grancolombiana vessels brought in, assuming they are bringing in about 14,000 a week— A. (Interrupting) 14,000 a week?

Q. Yes. A. Now you are talking about independents.

Q. I am talking about the overall market. A. Well, the

independents, mind you, have no control over the United or Standard; that's a separate entity; that has nothing to do with them. Therefore, you have to, if you want a figure on guessing the percentage, or what percentage the Grancolombiana Line bring in as compared to the Grace Line, what is their percentage, the Grace Line?

Mr. Lippman: That's the question.

Mr. Giallorenzi: No.

Mr. Lippman: I don't believe the witness understands your question, Mr. Giallorenzi. I request you rephrase it, or ask another one.

Q. What effect, if any, has the importation of the Grancolombiana vessels have on the banana market from 1955 on? A. Well, in view of the fact they don't compete with me, I wouldn't know.

.

829 Mr. Kurrus: Certainly, even though we have requested refrigerated space sufficient to hold up to 10,000 stems of bananas roughly, we consider that on the basis of the facts so far introduced that we are entitled to approximately, or I will say to half of the refrigerated space rather than all of it.

We consider that Mr. Consolo is, of course, qualified, and on the basis of the statement that he would not be willing to ship if anybody else is shipping on the Grancolombiana Line ships, we considered the only two qualified shippers so far as appeared in the record.

Our reparation case is based on half of the refrigerated space.

Secondly, I want to say with respect to the case itself.

We would like to prove our part of the case concerning the claim that Grancolombiana Line is a common carrier, and with respect to the damage aspect of the case we would like that delayed for the following reason:

A strange situation prevails here in that the only person who is benefiting from a delay of this proceeding is

the Pan-American Ecuador Shipping Corporation owned by Mr. Staff and Mr. Morey, as I understand it. Our primary business is the banana business and we are most anxious to get on the Grancolombiana Line ships as promptly as possible. We would much prefer to be on the ships than to recover damages.

We considered that the issues on the common carrier point are relatively simple, and that an expeditious decision could be rendered both by the Examiner and by the Board, and for that purpose, since the case has proceeded so long and since our damage case will take at least as long, as I see it, maybe longer, we would like an immediate decision from the Examiner and from the Board on the question of whether or not the Grancolombiana Line is a common carrier. We would like that decision right away.

It seems to me that if the damage part of this proceeding is going to go on and we are going to be delayed and I am not saying anybody is delaying this, except the necessity of proving the case. If the case is going to be delayed, we are going to be that much further behind and never get on the Grancolombiana ships, and of course
831 if the Grancolumbiana Line is found not to be a common carrier, that would end the case.

Therefore, I would suggest we have certain witnesses who we have to put on in New York, one of whom does relate to the damage aspect of the case, but I would suggest that when we get to Washington that the witnesses who are there be limited only to the common carrier issue and we would request that the decision or the procedure be expedited.

I would suggest oral argument before the Examiner at the conclusion, that exceptions to the Examiner's recommended decision be limited to seven days. That the Examiner notify the Board that there is an urgency attending to this matter and request that the Board hear oral argument on the matter promptly after the Examiner's decision is granted.

If necessary, I will make this in the form of a motion, and I hope the people here will agree to the request for what in effect, I suppose, is a severance of the proceeding just like was done in the Grace Line case.

Mr. Kharasch: Before responding or commenting on Mr. Kurrus's motion, may we have a couple of minutes to consult, please?

Is it all right, Mr. Giallorenzi?

Mr. Giallorenzi: All right.

Examiner Robinson: Certainly.

(Off-the-record discussion)

Mr. Giallorenzi: Since no officer of Grancolombiana Line is present at this time—

Mr. Kurrus: It seems to me that it does not involve any issue of authority from a client.

What I am requesting is that our case be distinguished—it seems to me that the complainant has the right to split up his case the way he desires. I understood that Mr. Giallorenzi, at the beginning, wanted to go through this procedure. I am requesting that the procedure be adopted now in order to expedite a decision.

We can either get on the ships right away or we cannot get on the ships right away, and I don't see the relevancy of whether his client is here or whether he is not here.

Examiner Robinson: You can say on Tuesday what you want to, Mr. Giallorenzi.

Mr. Giallorenzi: I can say on Tuesday, and also about this time which Mr. Kurrus has been talking about, seven days.

Examiner Robinson: You just think over all of that. You will know what he said.

Mr. Giallorenzi: Okay. He has made some motions that I wanted to say something about.

Examiner Robinson: Mr. Kharasch is going to say something first.

Mr. Kharasch: Are you suggesting that we hold it for Tuesday in Washington, Mr. Examiner?

Examiner Robinson: You go ahead and finish what
833 you were going to start to say when you said you wanted a conference with your associate.

Mr. Kharasch: We thoroughly agree that it is most urgent to get a quick ruling as fast as possible from the Examiner and the Board on the issue of Grancolombiana status as a common carrier, and we are pleased to join into a similar motion with respect to our case, if that speeds things up.

Mr. Giallorenzi: I just didn't quite get this whole thing, Bob.

Mr. Kharasch: I say we are pleased to do the same thing with our case if that speeds things up, that is, immediately sever the common carrier issue to proceed with what evidence, if any, Grancolombiana has that it is not a common carrier and at that point just to get as quick as possible a report on the common carrier issue.

Mr. Lippman has suggested that appropriate procedure would be that followed in the Charter-Hire case. I believe that is substantially the procedure suggested by Mr. Kurrus.

Mr. Kurrus: Yes.

Mr. Kharasch: The law is crystal clear on this subject and it does not require elaborate briefing.

Mr. Giallorenzi: Off the record.

(Off-the-record discussion)

Mr. Kharasch: One more point on the record.

You want to be clear that our evidence is in now
834 on the reparations except for one fragment that has not come along. We are not foregoing our evidence in any way, we are just suggesting that the quick procedure—

Mr. Kurrus: In that respect I want to say we are not giving up our reparations claim, we have one witness we are going to put on in a moment or two which relates to the reparations figure of our case.

The only thing we want is expedition in order to save Grancolombiana further reparations and get on the ships, and to make money the way we should be making money, by selling bananas rather than suing Grancolombiana.

Mr. Kharasch: It being understood we would have to continue with the same record we have already made.

Mr. Giallorenzi: Mr. Examiner, Mr. Staff would like to address you.

Examiner Robinson: Very well.

Mr. Kurrus: What is Mr. Staff's status, Mr. Examiner, at this time?

Examiner Robinson: He is not testifying. Mr. Staff wants to make a statement.

Mr. Staff: Mr. Examiner, the move by counsel is crystal clear. We removed ourselves as an intervenor. We will move to become an intervenor.

What has happened here is so crystal clear—if they want the Examiner to rule peremptorily—it is clear that
835 what everybody here is trying to do is get off the hook, including Grancolombiana, and leave the Panama-Ecuador Company holding the bag.

Mr. Giallorenzi: I object to that statement about Grancolombiana.

Examiner Robinson: We will not have any argument on any of this.

Mr. Staff: When the Panama-Ecuador Company gets ready to testify it will prove by its testimony that both of these plaintiffs never really wanted to get on the Grancolombiana Line, No. 1.

No. 2, that the Panama-Ecuadorian Shipping Company and its affiliates have lost money shipping on the Panama-Ecuadorian Shipping Company, and the Equadorian Fruit Company, and that their reparation chances will, in the end, be nil.

We will prove that one of them—one of these plaintiffs has already told the Grace Line that as of a certain date, in the presence of myself, and he will not deny it, had lost \$49,000 shipping on the Grace Line.

Examiner Robinson: Let us not go into detail. Just tell me in brief what your general idea is.

Mr. Staff: The idea is this, Mr. Examiner, open and above board: Is that the United Fruit Company is not shipping anywhere its normal percentage of fruit at this particular time.

Examiner Robinson: Let me cut you off still more,
836 Mr. Staff.

Mr. Giallorenzi: Why don't you tell him what you want.

Mr. Staff: We intend to intervene and we do not intend to be steam-rolled into any position.

Examiner Robinson: We do not want any comments on it.

You have made your point.

Mr. Kharasch: I want to request an opportunity to be heard on any petition which you may receive in the future from Panama-Ecuador Shipping Company or Mr. Morey or Mr. Staff.

I want to be heard on the petition intervening if they file one.

Examiner Robinson: Does anybody else have to say something, not on that?

Mr. Kharasch: Off the record.

(Off-the-record discussion)

Examiner Robinson: Are you ready to proceed with your witness, Mr. Page?

Mr. Page: Yes.

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878 Examiner Robinson: We will proceed, gentlemen.

As I recall, you made the motion to sever, Mr. Kharasch.

Mr. Kharasch: Mr. Kurrus did.

Examiner Robinson: I said I would like to hear from you today on that.

Mr. Giallorenzi: I had an opportunity to talk to my clients over the weekend, and in discussing the matter with them we feel that it would serve the best interests of Grancolombiana to hear all these issues at one time and dispose of them.

We have made arrangements with witnesses, particularly Dr. Diaz, to come here from Bogota, which he has, for the purpose of testifying in this matter. In fact, he had appointments to go to Spain which he put aside for the purpose of being available here. Since he has come up and we will need him to testify, particularly on the reparations angle, and also on the common carrier question, we feel that if we could sever at this particular time it would work a hardship upon him. He is a very busy man, running this company from Bogota with the services which you are acquainted with.

In addition, our method of presentation has been now changed and geared to the ruling which you made at the beginning of the hearings, that we would hear the reparations suits first and then continue on with our declaratory order.

879 In view of those facts we must oppose the application for a severance.

Examiner Robinson: Let's see if our thinking is the same on the ruling that I made. I don't think it was so all-inclusive that you couldn't sever. What I meant was that the basic claim, whether or not it was the reparation, should go on first and not simply reparation.

Do you understand what I mean?

Mr. Giallorenzi: Yes.

Examiner Robinson: How long do you think you would be in finishing your reparation feature, assuming we continued with that phase, both of you?

Mr. Kharasch: I would like to make one comment on Mr. Giallorenzi's statement. If Dr. Diaz is in the country I think very properly he could be accommodated at this time to testify.

Examiner Robinson: How much would you have on your reparation?

Mr. Kharasch: Not very much more.

Examiner Robinson: What do you mean by "not very much more"?

Mr. Kharasch: Very brief. A witness very briefly and possibly some additional examination of someone from Banana Distributors, which was at one time Mr. Consolo's selling agent.

Examiner Robinson: How about you, Mr. Kurrus?

880 Mr. Kurrus: It is difficult to say, Mr. Examiner.

We might have a week and we might have as much as three weeks. I would like to respond to Mr. Giallorenzi after having told you that I can't predict exactly what the time would be, but I will tell you there would be a substantial period of time to prove our case.

It seems to me that we have the right to put our case on in the manner we wish. The situation here is somewhat unusual in that the only party, and I use the word "party" not to indicate people in this case—the only company that is being benefited by the delay of this proceeding is the Panama Ecuador Corporation.

We want to get on the ship. We don't want to build up a reparations case against the Grancolombiana line. We'd rather make money, as I indicated at the hearing in New York, by shipping bananas rather than building up reparations.

It is a situation, it seems to me, where equity calls for a prompt decision on the common carrier issue. If the common carrier issue is decided for the Grancolombiana line, in other words, if they are declared not a common carrier, then of course the case is over.

If, on the other hand, they are decided to be a common carrier then I assume that within a relatively short period of time we, and perhaps other people, are entitled to ship bananas on their ships.

881 It seems to me that it is in the best interests of everybody to have that issue determined as quickly

as possible. If we wait on the reparations case, as I say, our reparations case is necessarily lengthy. We realize Mr. Giallorenzi has to have a considerable period of time to cross-examine on the case. It is not only lengthy but you are building up a substantial record that is going to take a considerable period of time to brief.

It is going to take a considerable period of time for the Examiner to decide the case, and of course the subsequent procedures before the Board are also going to be time-consuming. It is that procedure that we'd like to short-circuit for the moment.

We are not asking to give up our reparations case. We only want a decision on what we consider to be a relatively simple part of the case in view of two previous Board decisions, namely, whether Grancolombiana must or must not be a common carrier.

Mr. Giallorenzi previously wanted to try the common carrier issue separately.

Examiner Robinson: I might add that I was in general accord because I think it is most foolish to put in reparations in a case.

Mr. Kurrus: I am in accord, too. I wasn't a part of the beginning aspects of the proceeding. We got
882 into the proceedings sometime after the thing had gotten under way. We weren't a part of the first prehearing conference.

As far as Mr. Giallorenzi's witnesses are concerned, of course, Mr. Kharasch is agreeable and we are agreeable to having him put on anybody he wants. If he believes that some of these witnesses were going to be used to rebut part of our case we'd be perfectly willing to put on that part of our case which they would rebut and let them go.

In other words, I can't conceive that Dr. Diaz is going to be a rebuttal witness on the availability of bananas in Ecuador or the price at which bananas could be procured in Ecuador. I can't conceive that he is going to be a rebuttal witness on the selling price of bananas in Ecuador.

If there is any part of our case that Mr. Giallorenzi wants to go on, we will put it on.

I don't think that this proceeding should under the circumstances be delayed by the lengthy hearing procedure that is necessarily involved in having both of these reparations cases go ahead at this time.

We want basically a decision on the common carrier issue. We want it promptly and we want to know whether or not we are entitled to be on the ships. Of course if we are not entitled to be on the ships, then everybody is wasting his time here.

It seems to me that we ought to have that issue
883 determined promptly and expeditiously, as Mr.

Giallorenzi himself wanted, at least up until the first and second prehearing conferences.

Examiner Robinson: Mr. Blackwell, do you have anything you want to say?

Mr. Blackwell: Yes, Mr. Examiner. I think to a large extent many of the things that Mr. Kharasch, Mr. Kurrus and Mr. Lippman would like to accomplish by severance at this time could be just as effectively accomplished if we went ahead in the presentation of evidence and testimony in this case as we have in the past.

I think we will admit that although the taking of testimony here has been somewhat slow, it has been quite orderly. If we change it now the record might be disjointed to such an extent that it actually would retard rather than help the orderly development of the case.

I would, however, join with the movement in severing the case after we have established a record in the case. I don't think that it would amount to a great deal of delay. I don't know, of course, how long Mr. Kurrus is going to take with his complete case or how long Mr. Kharasch will take to wind up his case, but even if it is a delay, say, of two weeks that is hardly an unreasonable time figuring the time when the complaints were first filed.

The real delay, if we want to call it that, is in the
 884 decision-making process of the Board, not in the
 gathering of the record for that decision, and there
 I would welcome and join in a severance at the point where
 the record had been fully developed.

Another thing, Mr. Examiner, it might very well be possible that in arguing what we think to be the facts in relation to common carriers, some of the facts that appear ostensibly to be related to the question of reparations might equally be applicable to the question of common carrier. I think if we had a full record before us we could take up first in any short procedure the parties or the Examiner so desire the common carrier question and then leave for the ordinary course of this position before the Board the question of reparations.

Examiner Robinson: When does Dr. Diaz plan to be here?

Mr. Giallorenzi: He is here. He has been here several weeks, I think.

Mr. Kurrus: I would like to make a further comment, Mr. Examiner, if I might. It seems to me that it is the right of the complainants to decide how their case should proceed, and I don't really concede that, although I appreciate the arguments of Mr. Giallorenzi or even Mr. Blackwell to enter into this discussion, if we want to
 885 proceed with the common carrier part of our case it
 seems to me that that is basically up to us. That is
 what happened in the first Consolo case. That is
 precisely what happened in the first Banana Distributors case against the Grace Line, and what Mr. Blackwell says doesn't exactly make a great deal of sense to me because it is our burden to prove that they are a common carrier.

We might rest on the decision of the Consolo and Banana Distributors cases against the Grace Line, and perhaps the burden of overcoming those cases is on the respondent; but nevertheless it is our burden one way or another to prove that they are common carriers.

Perhaps some of the testimony on reparations would be relevant to the issue of common carriage, but we will put the relevant evidence in, and I think you have to leave it up to us to make out our case.

In other words, this is a complaint and answer case, and whatever the function of public counsel or anybody else is in the case it is basically up to the parties to prove what they have to prove.

Now, another thing is, once this common carrier issue is settled it may possibly be that some settlement could be reached between the parties, and it is always in the interests of the Board and any court to further rather than to hinder a possible settlement.

It seems to me that if we go ahead with this complicated reparations case we are laying on the record something that might possibly be of no value, something that is going to cause a great deal of hardship to the complainants who want to get on the ships right away.

A two-week delay is considerable. Any delay is considerable when we are trying to get on the ships right away, and it seems to me that the delay could be much longer than two weeks. It could be two months and maybe even a year if we go ahead with this type of procedure that is contemplated now.

Mr. Rosenzweig: Mr. Examiner, I would like—

Examiner Robinson: What is your name?

Mr. Rosenzweig: I will state for the record my motion.

Examiner Robinson: State who you are.

Mr. Rosenzweig: My name is Elias Rosenzweig of the office of Herman Goldman, 120 Broadway, New York, appearing for Panama Ecuador Shipping Corporation on whose behalf I intend, by this afternoon or tomorrow morning at the latest, to file a petition for leave to intervene in this proceeding.

In the petition in this case for reparations it is true, as these gentlemen have pointed out, that they have to establish the common carrier status of Flota because if

Flota is not a common carrier necessarily their claim for reparations is false.

I intend to show convincingly, I believe, on behalf of Panama Ecuador, which holds the forward booking
 887 arrangement with Flota, that even if the Board should determine that Flota is engaged in common carriage that nonetheless the forward booking arrangement which Panama Ecuador has with Flota is the only booking arrangement which can be made in view of the character of the vessels which are engaged in the trade; and that such being the case, even though it might be held ultimately that Flota was engaged in common carriage there could be then necessarily no reparations owing to the petitioners in this case nor any right in those petitioners to get on the ships.

That issue, I say, is intrinsically bound up with the issues which have been presented in the petition of Flota for a declaratory order.

It may be presumptuous to expect that you and the Board will allow intervention, but I say this in the nature of a caveat that if such intervention is allowed the position which is going to be taken by Panama Ecuador necessarily interrates the proceedings, both proceedings before the Board, and that therefore in view of that fact the petitioners should in the orderly course of presentation complete their presentation of their entire case before the case goes forward to other issues.

Examiner Robinson: Before I make a ruling I just want to answer one thing that Mr. Kurrus said, that normally

I think complainants do have the general right to
 888 proceed with their case in the manner in which they want, but unfortunately fifty percent of this, that is, one of the complainants is not completely free of having been tarred, by which I mean he asked for one thing at one time and something else at another. I just want to state my position on that.

I don't think that Consolo necessarily could have the same valid argument as Banana Distributors in view of

the proposition. That is not necessarily controlling. I want to put myself in this position, that you can't always control which way you want to present your case.

Mr. Kharasch: I don't understand your last statement.

Examiner Robinson: For instance, you wanted to go ahead with the reparations initially.

Mr. Kharasch: We thought it would be more expeditious.

Examiner Robinson: That is why I am separating you from Mr. Kurrus. That does not necessarily mean that you have a right to control your case at this point, but I say that would not stop me if I consider it. I thought I ought to express myself just generally on the subject.

I will go ahead and rule on the motion. I think it is perfectly proper that even though I said originally the two should be joined that it is probably better if we severed

889 them without, however, prejudicing Mr. Giallorenzi's position, in view of his witness, and so forth. In view of what Mr. Kurrus has said, that he would put on any witness even though it is a reparations witness that would be needed by Mr. Giallorenzi, I think with that understanding we ought to proceed with the merits.

Mr. Giallorenzi: I may say this, that this ruling has prejudiced me to this extent, that if we delay now and take only the common carriage issue and that is decided a month hence or maybe two months and then if by some strange coincidence these fellows should get some reparations, it would be enhanced or enlarged by this additional delay. I think that there should be a cut-off date.

I think they are entitled to nothing, and I think there are several cut-off dates that we can choose; but I think that by now extending this period of time, which will necessarily eliminate the hearings on reparations until the time of the deciding of the carriage issue, it would be piling up damages, if they are entitled to any, against Gran-colombiana.

That is one of the very reasons why I had opposed the severance, because when I discussed it with my clients they said that by agreeing to a severance you are enlarging the

period of damages. As I say, we are convinced they are not entitled to a nickel, but you do have that situation facing us and so we do suffer prejudice.

Examiner Robinson: On the other hand, you may
890 find out that by separating them you are better off than you were, but in any circumstances that could be something you could argue in case it ever went that far and you would have a very good ground for presenting your case.

With that in mind, we will proceed.

Mr. Kurrus: I might say that if Mr. Giallorenzi has a list of the witnesses he would like us to produce we will produce them, or if he wants to indicate any part of our case that he wants us to put on so that he can accommodate his witnesses and make full utilization of the talents of Mr. Diaz I would suggest he give us a statement to that effect within the next day or so and we will make the arrangements accordingly.

Examiner Robinson: Yes. Under the circumstances I expect the parties to give me full cooperation, in view of the disposition that has been made, so that nobody is going to be prejudiced.

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894 Mr. Kharasch: Mr. Examiner, at this point we have concluded our case on the issue of common carriage. We rest our case on the issue of common carriage. We do have, as I said, a little bit more on the issue of reparations.

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899 **Shillo Adir**

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kurrus:

Q. Would you state your name and address, please? A. Shillo Adir, 271 Church Street, New York City.

Q. What is your position with the complainant, Banana Distributors, Inc.? A. I am secretary-treasurer of the company.

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902 Q. Do you have any steady customers who rely on your importations? A. I would say we have some customers that rely exclusively on our own importations, but mostly they buy from other companies and perhaps from as many as three or four.

Mr. Giallorenzi: I would like to be heard at this moment. I don't see the relevancy of this line of questioning.

Examiner Robinson: I am allowing it on the basis that it is showing what kind of an organization it is and that he has been importing bananas, is capable of importing them and disposing of them.

903 Is that basically what you are doing?

Mr. Kurrus: That is basically it. Mr. Examiner, one of the aspects of proving that we are entitled to get on the ships right away is that we have some ability. We are not going into proving our entire damage claim at this time, but of course Grancolombiana Line might be a common carrier and might not have to put anybody on the ships if they weren't qualified. We want to prove our basic qualifications.

Examiner Robinson: That is what I thought you had in mind. Otherwise I would have objected myself.

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920 Q. On the basis of your experience as a banana importer and banana distributor, is there any significant difference between the Grace Line operation and the Grancolombiana operation which would prevent the commingling of fruit on the Grancolombiana Line vessels? A. No, there is not that I can see.

Q. Let me ask you this. Do you know of the Panama Ecuador Shipping Corporation? A. I never heard that name before this trial. I knew them as Ecuadorian Fruit and Shipping Company.

Q. But you understand that is the same company? A. Yes, sir.

Q. Are they a direct competitor of yours in the importing and distribution business? A. Yes, they and all the other importers of bananas.

Q. Are you familiar with the quality of bananas which they have brought into the United States? A. Yes, I am, and I believe that their bananas most of the time are better than ours. That's one of the things we discussed about in talking to Mr. Friedlander. We had hopes that his knowledge of Ecuador—and he does have knowledge of that area—would help us in getting bananas of the type that they have been bringing in Philadelphia Grace Line boats.

Q. As far as the quality of the banana when it arrived in the United States, which I take it has something to do with the quality of the service which Grancolombiana Line offers, is that, to your knowledge, satisfactory? A. I know that for the past two years or such it has been very satisfactory, or three years. Earlier than that in 1953 we had some experiences where we sold bananas for someone who imported on the Grancolombiana Line and their carriage of bananas was completely unsatisfactory. But today they bring them up in very good condition.

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935 Cross-Examination

By Mr. Giallorenzi:

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983 Q. Are you buying bananas from Arosemena at the present time? A. No, sir.

Q. When did you stop buying bananas from him?
984 A. I believe it says April 1, 1958.

Q. So at the present time you have only one supplier? A. That is correct.

Q. You don't have any written agreements with any other suppliers? Do you have any written agreements with any growers? A. No, sir.

Mr. Kurrus: Mr. Examiner, this might be a convenient place to observe that this entire cross-examination by Mr. Giallorenzi, in it he has been indulging in what I thought was going to be done in a cursory fashion, but it seems to me he is going into it in great detail, has nothing to do with the issue that is now being tried in the case. Obviously we are not so crazy as to put in the flimsy kind of case we have put in if we are proving our damage case at this time. That is not what we intended to do.

I asked Mr. Adir certain questions to show their standing in the trade, their ability to operate at the present time.

Examiner Robinson: You can stop right there. That is what I think he is trying to show. One of these things is the ability to procure.

Mr. Kurrus: He is going way back. Of course we will tie this in when we prove our case.

Examiner Robinson: He can't rely on you, what
985 you are going to do. As long as there is any connection at all with this matter, I don't see anything particularly wrong with his questioning.

Mr. Kurrus: He is wrong with his questioning on the point of whether they are a common carrier or not.

Examiner Robinson: You put in your evidence to show that Banana Distributors was capable and good in the trade.

Mr. Kurrus: At the present time.

Examiner Robinson: All right. He has to have a series of things.

Mr. Giallorenzi: That is why I objected this morning when Mr. Kurrus went so far afield.

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986 Q. Exhibit 35 shows the dates and days of the week on which Grancolombiana vessels arrived at Philadelphia. You look at the first, second, third and fourth pages. In fact, if you look at the whole exhibit you will note the vessels arrive different days, any day from Monday to Sunday during the various weeks. On some occasions they arrive the same day in subsequent weeks.

Do you consider a weekly service where the vessels arrive at different days of the week an adequate one? A. I have looked at this exhibit before. I think it was introduced earlier. I noted that in all of this year, 1958, with the exception of perhaps two boats, maybe three, all 987 your vessels come in Wednesday or later, and that would be just perfect.

Q. That would be just perfect. What about prior to this year?

Mr. Kurrus: I object to that. I don't see what prior to this year at this time has to do with the case we are now trying. If he wants to bring that out in the other part of the case, let's do it then.

Examiner Robinson: I will permit it for the year 1957.

The Witness: In '57 you maintained a pretty good schedule, also, but instead of coming in the weekend part of the week you came in the beginning part of the week. You were coming in Sunday, Monday, Tuesday and Wednesday.

By Mr. Giallorenzi:

Q. Do you consider those arrivals good ones? A. It doesn't matter if you have space on the ship. In the long run the market is a plus month, no matter when arriving, if you end up with a plus figure.

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993 Q. Is it desirable to stay at a port up to 60 hours?

Mr. Kurrus: I object.

Examiner Robinson: I think that would depend on the lapsed time from the time of loading to discharge.

Mr. Kurrus: I have a substantive objection to the question. Mr. Giallorenzi has persisted in this line of questioning before and he is doing it again, and I object to it.

Apparently he is trying to prove that Grancolombiana Line's contracts are so onerous and that their service is so poor that nobody should ship on their ships. Whether that be a fact or not, it is rather unusual, it seems to me, that Mr. Giallorenzi should be trying to prove that. But

in any event we are not here asking to ship under a contract on the Grancolombiana Line. We are here asking that Grancolombiana Line be declared to be a common carrier.

Mr. Giallorenzi keeps alluding to this contract and that these conditions are in the contract, and now he is going to ask, I suppose, as his next question: Would
 994 these terms be acceptable to you? So the conditions are in the contract, and so what? They mean nothing.

As I say again, we are asking that they be declared to be a contract carrier, a common carrier. We are not premising our claim on some contract that they drew up, and we didn't even know the terms of the contract until they were divulged in this case. Certainly Mr. Borrero knew, but nobody in Banana Distributors knew what the terms were. Whether Grancolombiana Line could put these conditions in some kind of a forward booking agreement, whether they would or not, is certainly something that they might prove later on; but there is no foundation for it at the present time.

I object to these questions premised on the Grancolombiana Line contract with Panama Ecuador Corporation as the basis for a series of inquiries as to whether or not we would be willing to ship under the same circumstances. It is a completely warped kind of inquiry, it seems to me.

Mr. Giallorenzi: What Mr. Kurrus forgets so conveniently, and I am a little amazed at it, that he spent all morning going over a wide range of items which encompassed the question of common carriage and reparations all in one. At two particular points I interposed objections and they were overruled.

Since that was the status of the record, I felt that this cross-examination was entirely relevant. I mean,
 995 if he wanted to go into the question of common carriage alone, he should have limited his questions to

a few pertinent things and I'd have limited my cross-examination to that.

As the record now stands, I have heard a little bit of testimony on the ships themselves and the effect of intermingling cargo and the speed or lack of speed of the loading and unloading, which I think go to the question of common carriage alone. But that is a very insignificant part of the testimony of Mr. Adir this morning.

Examiner Robinson: Any comments, Mr. Blackwell?

Mr. Blackwell: No, sir.

Mr. Kurrus: I have a comment, Mr. Examiner. What Mr. Giallorenzi has just said is a meaningless type of argument. It isn't even responsive to the objection I raised, which is, what is the relevancy of this line of questioning.

He says I did something on direct. What did I do? I would just like to have him say what the relevancy of this is. I think that is a simple request.

Mr. Giallorenzi: You were trying to establish, first of all, that Grancolombiana is a common carrier and you have asked some questions from your witness. You also went ahead and attempted to qualify him as a shipper, and he went off on many other items involved there, too, and these very items that I am cross-examining him on.

996 Mr. Kurrus: I didn't ask him anything about your contract.

Examiner Robinson: I am inclined to agree with Mr. Kurrus.

Mr. Giallorenzi: He opened the door this morning on this.

Examiner Robinson: On the contracts?

Mr. Giallorenzi: On the whole related subject.

Examiner Robinson: That doesn't necessary mean that you can get everything in. There has to be some limit. I think fundamentally he has a good objection. As I say, I am going to allow all of you reasonable latitude because it is hard to desegregate—let's keep out the school prob-

lem—on this thing, but that's why I want to be pretty liberal. I think fundamentally he is right.

Mr. Giallorenzi: For example, he went into these conferences with reference to the Grace Line. I don't think that had anything to do with common carriage. It had more to do with reparations. But that testimony went in. He went into other items strictly reparations. I don't know why he went into them. He is now pressing the objections that I pressed this morning and I was overruled.

You have taken a leaf out of my book.

Mr. Kurrus: No, I am not pressing the same type of objection at all. The only theory of my presentation
997 was to prove that Banana Distributors was a qualified shipper at the present time. Naturally it involved going back a few years to prove that. Some of those things do touch on reparations, I admit. In so far as the reparations features of them are concerned, Mr. Giallorenzi can cross-examine to his heart's content when we put in our case. But I didn't question him about the contracts. I didn't go back and question him about the availability of bananas in Ecuador in 1955 and 1956, all of this stuff that he has already put in.

This senseless remark that the door is open without—

Examiner Robinson: I don't think you need to go on. I sustain the objection.

We will take a short recess.

(Short recess.)

By Mr. Giallorenzi:

Q. Mr. Adir, are you familiar with the Grace Line vessels? A. I believe I am, sir.

Q. Have you ever been aboard any of them? A. Oh, yes, most of them.

Q. Would that be passengers and freighters? A. Yes. We've handled bananas on both boats since the early part of this year.

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1016 By Mr. Giallorenzi:

1017 Q. You testified that Panama Ecuador is in competition with you. Can you tell us to what extent? A. All bananas imported, no matter by whom, are in competition with the other bananas imported. It is a market commodity.

Q. But you can't pinpoint any certain percentage or anything like that? A. I told you that we do sell some customers together, but even the ones that we don't sell together, they are in competition. They may be in the same area or we may not be able to sell their accounts, they may not be able to sell ours. I don't just mean direct competition where we buy for the account or sell them jointly or along with United Fruit, but we may call on one account and have them for a customer and at a later date they may successfully sell them, or vice versa. That is the extent of competition. We compete with the United Fruit Company, also.

Q. Do you compete with Standard Fruit Company? A. Whoever brings in bananas competes. I don't suppose United would make that statement but any others
1018 than United would.

Q. The price of bananas you obtain, are they similar to the prices Panama Ecuador obtains?

Mr. Kurrus: I object to this. I didn't go into prices of bananas on direct. We have dropped the reparations case for the moment, and unless Mr. Giallorenzi could show some relevancy to the common carrier question I think that question ought to be ruled out.

Mr. Giallorenzi: Do you concede that this point of competition has no relevancy to the question of common carriers?

1019 Q. You heard Mr. Dixon testify, or rather, Mr. Myer, and I believe Mr. Consolo testify, that the

price of bananas generally at Philadelphia is the same that you can obtain in New York. Do you agree with that statement? A. You can sell bananas in Philadelphia and in New York for the same price, but we don't sell bananas most times for the price that—your question was, and I'd be glad to answer, do we get the same for our sales as Panama Ecuador does?

Q. Yes. A. I would say that we get more.

Q. You get more? A. So I would think or I am positive that if we sold bananas in Philadelphia we'd get the same price that we get in New York, not that they get in Philadelphia.

Q. And your price in New York is more than the
1020 price in Philadelphia? A. I think on an average cargo we average more per pound than they do.

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1022 Q. In this market which you just testified to about the importation of bananas, could you tell us what the dominant force is, independents or Standard or United Fruit? A. United Fruit is always importing the largest quantity of bananas; in the present market since they are so very short it doesn't matter what the name of the company is. If you have bananas to sell, you sell them.

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1032 Mr. Kurrus: With reference to the petition of Panama Ecuador Shipping Corporation, we violently oppose it. We believe that they have no right to intervene at this stage of the proceeding, and that no court in the country would allow intervention under these circumstances.

First of all, I might say that there is no question that if Panama Ecuador had intervened or attempted to intervene at the proper time that their intervention might have been allowed. The lachrymal plea which is contained in this petition has got nothing to do with allowing

their intervention at this time, and I want to emphasize that it is the time of the intervention which is the critical issue here.

1033 The issues in this proceeding, the basic issue of common carriage, has been pending before the Board for over a year. Grancolombiana Lines' petition for declaratory order was filed in October of 1957, and Consolo's complaint was filed in November of 1957. Banana Distributors' complaint was filed in July of 1958. During this entire period the issues of whether or not Grancolombiana Line is a common carrier have been pending before this Board.

It is well known, of course, to the petitioner, Panama Ecuador Corporation. The Panama Ecuador Corporation, in fact, was originally a part of the proceeding where they were joined as a respondent, and they promptly got out. They say they got out because they didn't want the onus of being another person subject to the Act. What difference that would make to them, I don't know, but in any event if they didn't want to be another person subject to the Act and didn't want to be joined as a respondent, they certainly could have filed a simple petition for intervention at that time.

The issues with respect to whether or not Grancolombiana Line is or is not a common carrier have always remained the same. Nothing has changed at all during this entire period. The petition for intervention cites no changed circumstances which would forgive this petitioner from having filed a petition for intervention when it should have filed one, namely, at the outset of the proceeding rather than now.

1034 The only thing that has changed during this entire period is that last Friday a motion was made to sever the reparations part of this proceeding from the common carrier issue. At that time we recall Mr. Staff got up and made some hurried remarks on his own. It was

followed by a visit of his attorney to Washington, and today they file a petition for intervention.

1054

Jack Friedlander

was called as a witness, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Rosenzweig:

Q. Mr. Friedlander, what is your occupation? A. I am the General Manager of the Ecuadorian Fruit Import Company.

1099 Q. Now, before the objection you were stating for the record what a pontoon is. A. A pontoon is a barge which we use to store the loading equipment, the stages that are used for the stevedores to walk up to the side port from the banana barges, the horizontal pieces, all of the loading equipment involved in getting the fruit from the banana barges to the holds.

Examiner Robinson: It is sort of a buffer between the actual loaded barge and ship.

The Witness: That is correct, and it also carries all of this equipment.

1216 Mr. Giallorenzi: I would just like to make a preliminary statement. I will make it as brief as possible.

1219 So, in conclusion, we take this position here: that for the sake of this declaratory proceeding we do not say that the Grace Line decision is good, bad or indifferent. That will be up to the Circuit Court of Appeals to decide next month. But we accept it as the law of this

case until the CCA reverses them, if they see fit to reverse the Maritime Board. But we say we have presented some facts and we will present some more through our two witnesses this morning, and we say to you, accepting the Grace Lines decision as law, although it may be reversed, that in examining these facts which we will put in and some

of them have been put in through Mr. Rosenzweig—
 1220 I was going to cover that with Mr. Friedlander until he intervened—are there sufficient facts brought before you to distinguish these cases from the Grace Line case which would say that the Grace Line case is good law but inapplicable because of the differences which we have set forth in this proceeding. That is all we are seeking to learn from the Board.

Again I repeat, assuming that the Grace Line decision is good, valid law, and we are not attacking that in any manner, shape or form—

Examiner Robinson: You think your facts differentiate your case from the necessary holdings in the Grace Line case?

Mr. Giallorenzi: That is right.

* * * * *

Jose J. Borrero

was recalled, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Giallorenzi:

Q. Mr. Borrero, you have been previously sworn in and you have testified that you are or have been the Acting General Manager of Transportadora Grancolombiana, LTDA., the General Agent in the United States of
 1221 Flota Mercante Grancolombiana and that you are now the Executive Vice President of Grancolombiana, N. Y., Inc., which is the general agent in the United

States and Canada for Flota Mercante; is that correct? A. Yes; that is correct.

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1230 The Witness: Off the record. Of course, there was also Mr. Consolo, in 1954, who was around the place.

Mr. Giallorenzi: I notice that they have smiled over there. I ask that they cut that out.

Examiner Robinson: I don't think that he is taking it personally.

Mr. Kharasch: I think Mr. Borrero was being cute when he said Mr. Consolo was around the place.

Examiner Robinson: If they embarrass you, let me know and I will kick them out.

The Witness: This is friendly.

Examiner Robinson: It is friendly until you have to pay money.

The Witness: That is off the record, of course. He was there, Consolo; he looked at the vessels, too, looked at the prices. He couldn't pay those prices. The vessels,
1231 in his opinion, were not adequate.

Examiner Robinson: Let me ask you something: When you say he couldn't pay the prices, do you mean he didn't have the money?

The Witness: No, no, I mean—

Examiner Robinson: He didn't want it at that price.

The Witness: He didn't want to pay the price.

Mr. Rosenzweig: You were saying the vessels, in his opinion, were not adequate.

The Witness: I will come to that point. I have in the record here that he mentioned the height of the different decks, especially the height of the lower hold which, in his opinion, represented a loss of space. He said that he wasn't going to pay for space that he couldn't utilize. But the point that we tried to make clear to every shipper, Mr. Examiner, was the following: We are not selling you the

space for you to carry one stem or 15,000 stems of bananas; we are not selling you the height of the decks; we are selling you a chamber or a hold and the price is \$7,000. You could put it horizontally or vertically; it is up to you. That isn't the point, you see. You have a house with four rooms and that is the house. If you have the house and you are paying that rent, you can sleep five people or two people in the house, but this is the price of the house. That was 1232 the provision of the company. He offered—he indicated—I won't say "offer"—he indicated that he would be interested in the two upper chambers or in the three chambers provided 25 per cent of the price was cut down in the lower hold. Of course you have to realize in the hypothetical case the Grancolombiana would agree to rent the two upper chambers. That would represent for the company a loss of one-third, more than one-third of the rent that the company was interested in getting.

By Mr. Giallorenzi:

Q. Would the company have agreed to that? A. Would the company have agreed to rent that? No, because the lower holds are the greater volume than the other two because they were higher. Then I would say you would take a loss because of this: You couldn't utilize that hold for anything.

Mr. Blackwell: Would you repeat that?

The Witness: You couldn't utilize the lower hold because the end of the run was precisely Guayaquil. Then it is the custom or it was the custom at that time only to put cargo, southbound cargo in number three hold for Buenaventura only so that after the vessel sailed for Buenaventura they could start, the crew of the vessel could have started cleaning the hold and preparing the hold and bringing down the temperature so that at the arrival of 1233 the vessel at Guayaquil the hold was ready for bananas. Once the temperature was at an even point,

the loading of the bananas could take place simultaneously with the unloading of other cargo for Guayaquil.

By Mr. Giallorenzi:

Q. What holds were used for the other cargo? A. The other four holds of the vessel. When they were unloading the other holds, they could be loading the bananas in number three and load the other cargo and get out of there. Then you couldn't use that hold for any other thing because the only way to go to the lower hold was through the other decks that would have been occupied with bananas. Then you can see why the company couldn't follow this procedure.

Examiner Robinson: You might just as well lock the place up and throw the key away.

The Witness: Then, as I said before, this was the price and the conditions that the company offered. We couldn't guarantee arrivals or sailings.

Then in 1954, December, 1954, or the beginning of 1955 the company inaugurated a service for on the west coast of the United States and Canada to Guayaquil, and in view of that in that particular trade there were offers of refrigerated cargo, frozen cargo at this time—tuna fish, frozen fish—and in view of no success at all with 1234 this vessel here in the east coast service, the company placed two of their vessels, the Ciudad de Cali and Ciudad de Quito, to the west coast service.

Examiner Robinson: West coast of the United States?

The Witness: West coast of the United States, where they carried in the northbound trips full loads of tuna fish, frozen tuna fish. Then the service in the east coast only remained with three reefer vessels.

By Mr. Giallorenzi:

Q. You mean the service on this east coast? A. On the east coast.

Mr. Blackwell: That was when?

The Witness: That was from January, 1955, to sometime in September, 1955. In the spring of 1955, I think, Consolo was again inquiring about the space. At that time we didn't have five vessels; we had three, but the company was willing to bring back the other two vessels here if finally somebody would decide to sign the contract for a definite period of time and give the certain guarantees and accept the conditions of the service.

Mr. Consolo again stated the point of view about the differences in the height, and the company being in no position to change its standpoint, then he walked out.

Then out of this conversation with Mr. Perlstein 1235 that I mentioned before—one had to recognize it was a very strong fellow that wanted to carry bananas—came the Ecuadorian Fruit Company. Then Mr. Perlstein, I think I can safely say that he brought Mr. Morey and Mr. Staff to Grancolombiana and through his insistence Grancolombiana advanced conversations with Messrs. Morey and Staff for the possibly grant or hiring of refrigerated space of the five vessels.

Then in June—sometime in June—when the conversations had advanced with Mr. Morey and Mr. Staff, the company thought that it was necessary to advise the public, in the interest of those people who had either called us or had visited with us about the space, that we put an advertisement or a notice in the Journal of Commerce, which is usually in New York the recognized shipping newspaper data, that—

By Mr. Giallorenzi:

Q. I show you Exhibit 7.

Examiner Robinson: Let him complete his answer. You said you desired to put in an advertisement.

The Witness: Yes, that would read more or less—You want to give me that now?

By Mr. Giallorenzi:

Q. I show you Exhibit 7, Mr. Borrero, and ask you if those are the two advertisements you placed in the 1236 Journal of Commerce. A. Yes, these are. We are interested in receiving an offer for this space or invited an offer for this space just to see if there was anybody at this time again interested in doing business with us.

Q. Did you receive any response to those ads? A. No. Then the negative being no reply to this call, the Company decided to continue negotiations with Messrs. Morey and Staff, they being, in our opinion or in the opinion of the company at that moment, the only ones interested in this space and in the terms and conditions that the company was in position to offer. When Mr. Morey and Mr. Staff signed the contract—

Q. By that you refer to Exhibit 15, Mr. Borrero? A. (continuing)—on July 20, 1955, at 7:15, only three vessels were in service. Of course we offered the other vessels, which would come back as soon as possible, the two vessels on the west coast, as soon as possible to join these other three in order to be able to perform the contract as it was signed, and I believe it was sometime in September, 1955, when the five vessels were all ready on this side of the Atlantic.

* * * * *
1243 Q. Now, Mr. Borrero, when the vessels do stop at Buenaventura, what is the principal cargo which you load? A. Coffee.

* * * * *
1280 Mr. Kharasch: May I inquire whether early in 1957 you received a proposition or bid or letter from a Mr. Noboa or from Panama Ecuador or Morey and 1281 Staff, copies of which have not been introduced or copies of which have not been supplied to us?

Mr. Giallorenzi: I will answer that. When the contracts of Panama Ecuador came up for renewal, there was a bid

submitted to Bogota by Messrs. Morey and Staff for Panama Ecuador. At this particular point I was not going to go into that because I think that bears solely on reparations and the best witness to testify as to those letters and the actions which were taken upon those bids by the Board of Directors of Grancolombiana would be Dr. Diaz. For that reason I have not introduced those documents into evidence. But since you have requested them and I have tried faithfully to supply you with everything that you requested, and even more, I will make them available to you right here and now. I have them in my file.

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1282 By Mr. Giallorenzi:

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1283 Q. Mr. Borrero, after Flota received the various requests for allocation of space from these perspective shippers, did you make that fact known to Panama-Ecuador Company? A. Yes, we did.

Q. And to whom did you confer with in that connection? A. Well, only I and Dr. Diaz, and I don't recall the exact day or the moment, but it was made known to Mr. Staff and Mr. Friedlander and Mr. Morey.

Q. And what were you told by them? A. Well, I may say that they made it known to the company that
1284 they consider that they have a valid contract with the company and that if we were going to open up this or take any unilateral action about the contract we can expect a suit, a demand.

Q. Now after you had that conference or conferences with Panama-Ecuador Company, what did Grancolombiana do? A. Grancolombiana did the only thing that in the opinion of the company was to be done and that was to come to the particular body which made the decision that put the company in this dilemma and present this case to that body, and in the development of that thinking of the company, we came to Washington. We came with you.

Q. Was that visit to Washington on October 1, 1958, with me and Dr. Diaz? A. That was the visit.

Q. October, 1957. I am sorry. A. Yes, it was October or September of 1957.

Q. 1957, October 1st. A. Yes, 1957, and we visited Mr. Tibbott and another gentleman whose name I don't remember. We had requested Mr. Tibbott for an audience so we could come and talk with him about certain matters that was worrying us. We were worried. Then we got to Washington with these two gentlemen and we hoped that they would give us a quick answer.

Q. Did you get the quick answer? A. We went to 1285 them and we gave to them the same story that we are giving here to the Examiner—of course without all this detail and time, these interrogatories and counter-interrogatories. We had this conference with these gentlemen and they couldn't do anything then, so the company then decided the next thing to do was to file the petition for a declaratory order and be ready to put before the Examiner all the circumstances surrounding the transportation of bananas in Grancolombiana, the characteristics of our service, the peculiarities of this service, to the best of our ability, which is what we are trying to do now, without any intention to antagonize or to carry favor with the authorities, but just to give the Board, in accordance with our opinion and in the way we see these things, all of the facts for this body to make a decision, a decision that could be carried out within our capacity to deliver because otherwise we may find it impossible or impractical to continue carrying bananas with the detriment of our company for the loss of revenue, the detriment of Ecuadorian economy because although the amount of bananas that Grancolombiana is carrying out of Ecuador is not great percentage-wise in relation to the total banana export, it represents a good amount and it would grow. Withdrawal of that service by Grancolombiana would be detrimental to the economy of Ecuador and withdrawal of the transporta-

tion in general will be detrimental to the inter-
 1286 American trade that we as Americans—northern,
 southern, central, as well—should devote our inter-
 ests and our efforts and our energy to promote and to
 develop.

Examiner Robinson: Off the record.

(Discussion off the record)

Mr. Giallorenzi: No further questions.

Examiner Robinson: Mr. Page.

Mr. Page: Oh, let Mr. Kharasch be first.

Cross Examination

By Mr. Kharasch:

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 1295 Q. Exactly. It is not your decision to go to Puerto
 Bolivar; it is for company convenience? A. No, but
 it would be a decision to go to Guayaquil or not to go to
 Guayaquil to load bananas.

Q. The first contract, and I believe the subsequent con-
 tracts which you had with Messrs. Morey and Staff or their
 companies provided that the shipper should pay Gran-
 colombiana something extra if the ships went to Puerto
 Bolivar? A. Yes.

Q. To your knowledge, was that extra collected
 1296 from the shipper? A. Yes, unless nullified by any
 letter of agreement, it was collected.

Mr. Giallorenzi: I don't know what the relevancy of this
 line of questioning is, but I am trying to keep my objections
 to a minimum so that we could expedite these protracted
 hearings.

Examiner Robinson: Do you want to ask him about this?
 I frankly don't know.

Mr. Giallorenzi: Mr. Kharasch, what is the purpose of
 this line of questioning?

Mr. Kharasch: I propose to show that from the incep-
 tion of the contracts with Messrs. Morey and Staff that

contrary to your statements, Mr. Giallorenzi, at the opening of your case, contrary to the position of intervenors, Panama-Ecuador, as expressed in their intervention petition, Grancolombiana has engaged in a regular practice of favoring these shippers; that contrary even to the terms of their own contract, that contrary to your statements at the opening of your case and some of the testimony of Mr. Borrero, that the contracts with the present shippers were modified in the shippers' favor and made in the shippers' favor, at times when the Maritime decision which you say you accepted had already been issued and at times when

1297 Mr. Consolo's offer was lying before you and you could have obtained more money for your space from Mr. Consolo.

Examiner Robinson: How can you prefer a shipper when you don't have but one?

Mr. Kharasch: Because their defense, Mr. Examiner, in part—Well, let me start over.

Examiner Robinson: I am just asking you for your contention.

Mr. Kharasch: The primary discrimination, of course, is keeping my client off the ship. There is no question about that. The defense of Grancolombiana, as just recited in Mr. Borrero's testimony, has been "well, we dealt fairly; we wanted to do the best thing; we tried to do the best thing for the company." I propose to show that they have taken action after action and time after time have preferred the present shippers when other shippers were ready and waiting to take the space. The issue introduced by Panama-Ecuador in its petition to intervene was, or an issue introduced in their petition to intervene was that even if Grancolombiana is a common carrier, the present shipper, Panama-Ecuador, is entitled to complete its contract and keep the space for another eighteen months or two years.

Examiner Robinson: But do we have to assume that they wouldn't treat other shippers the same way if they had more than one shipper? That is the point that concerns me.

Mr. Rosenzweig: Or if there was another single 1298 shipper.

Mr. Giallorenzi: The issue that Mr. Rosenzweig, if I can say that it is an issue, that he introduced has no bearing on my petition for a declaratory order and if he wants to introduce a thousand issues, let him do it in an appropriate proceeding. I think the only thing pending before the Board right now is the question of the applicability of the Grace Line case which I conceded is the controlling law, to make things simple, to these set of facts. Now whether we favor them or didn't favor it, I don't see any relevance of it and just because Mr. Rosenzweig may have introduced some testimony on that issue, I don't think it is of any moment in my case.

Mr. Rosenzweig: I don't know, everyone is attributing to me testimony or issues on the phase of the case which is alleged to have been opened by me.

Examiner Robinson: I don't even recall that.

Mr. Rosenzweig: I don't recall Mr. Friedlander testifying to anything other than the conditions of the vessel.

Mr. Kharasch: I will read your petition if you like.

Mr. Rosenzweig: Go ahead.

Mr. Kharasch: Mr. Examiner, in the first Consolo case, and we are trying now the issue of common carriage 1299 that was tried in the first Consolo case, the Board report said that Mr. Consolo was entitled to 40,000 cubic feet of space and should be preferred to the present shippers. Our complaint here asks for the allocation of space to us. In the Banana Distributors' case, your one issue was, and it is an issue here, whether the existing shippers should be allowed to participate in this space.

Examiner Robinson: I didn't say they should be preferred to the present shippers; I said it shouldn't be followed.

Mr. Kharasch: I say you passed on that issue.

Mr. Rosenzweig: I would think that would be an appropriate issue after Mr. Robinson has rendered his decision.

Mr. Kharasch: No, it was tried at the same time.

Mr. Giallorenzi: Are you assuming that if the decision here should be that we must throw open the space that we are not going to give any consideration to your client and your purpose now is to build up your client?

Mr. Kharasch: Where is this petition to intervene?

Examiner Robinson: I, frankly, don't see any relevance in this, Mr. Kharasch. I am going to give you opportunity to express anything further you have, but at the moment I don't see it.

Mr. Kharasch: Are you asking me to desist in this line of questioning as to concessions made to this present 1300 shipper?

Examiner Robinson: I have not been convinced, let's put it that way, as to the relevancy of it.

Mr. Kharasch: I say it is relevant as to discrimination in favor of the present shipper and that the testimony is relevant to rebut the testimony that Grancolombiana refused the other shippers because they had a good contract with Panama-Ecuador.

Examiner Robinson: Well, until you can show that they would treat your client or somebody else in a different fashion, assuming they were in here on equal terms with the present shipper, I don't see the connection.

Mr. Kharasch: You say unless I can show that they wouldn't treat them as equals?

Examiner Robinson: Yes. In other words, where you have one shipper, I don't see what difference it makes for the basic issue which we are proceeding on now how they treated them. Now if you say, well, we know they wouldn't have treated our client the same way or something, that is something else. Even then I don't know whether you would be able to put it in, but you don't even have that.

Mr. Kharasch: Well, let me address my question to Mr. Borrero.

By Mr. Kharasch:

Q. Referring to Mr. Consolo's offer dated March 6, 1301 1957, please look at page 2 of Exhibit 25, Mr. Borrero. A. Yes.

Q. Why was that offer of Mr. Consolo's rejected by Grancolombiana?

Mr. Giallorenzi: I object to the question on the ground that it is outside the scope of the issues of the petition for declaratory order.

Mr. Kharasch: We are not trying your case.

Mr. Giallorenzi: Now you wait a minute. You are trying my case. You are not trying one case one day and the other case the next day. I object on the further ground that that offer was made to the head office of Grancolombiana in Bogota and if and when you get to the point of reparations, Dr. Diaz will be here to answer the questions.

Mr. Kharasch: It has much more to do than with the case on reparations. We are trying here the common carrier issue tendered by the complainants in Dockets 827 and 841, and the common carrier issue tendered by your petition in Docket 835.

Examiner Robinson: Did you say Exhibit 24 or 25?

Mr. Kharasch: Exhibit 25, Mr. Examiner.

Mr. Rosenzweig: I am at a slight loss here.

Examiner Robinson: If you think you are at a slight loss, I am away ahead of you.

Mr. Rosenzweig: You at least can find them. I 1302 don't even have them.

Mr. Kharasch: Exhibit 25 is Mr. Consolo's offer to Grancolombiana in March, 1957, saying "I want space; here is what I will pay for it." Nothing could bear more directly on the discrimination than whether it was justified or not and nothing could bear more directly on the issue of common carriage than why they refused it.

Mr. Rosenzweig: Mr. Examiner, may I be heard?

Examiner Robinson: Are you finished?

Mr. Kharasch: Yes.

Mr. Rosenzweig: In this offer Mr. Kharasch is making a comparison of dollars purportedly offered by Mr. Consolo with a number of dollars which are stated in the contract between Panama-Ecuador and Flota Grancolombiana. The contract between Flota Grancolombiana and Panama provided that the vessels would call to discharge at the port of Philadelphia. The contract—the proposal which was made by Mr. Consolo said, after stating prices, which are a few hundred dollars higher, and I guess deliberately designed to create an issue of discrimination—

Mr. Lippman: Mr. Examiner, I think this has gone far enough. Mr. Rosenzweig was not present during the early days of this hearing when we went into this matter ad infinitum and you ruled, I believe, that the document which covered the contractual provisions with respect to 1303 the North Atlantic ports of unloading for the Grancolombiana vessels would speak for themselves. You ruled on any arguments concerning these provisions.

Mr. Rosenzweig: I will quote these provisions. I will read from the document.

Mr. Lippman: That has been quoted. You are coming a little bit too late.

Mr. Rosenzweig: If I may finish, Mr. Examiner,—“We understand from your New York office that these ships load at Guayaquil, Ecuador and come to North Atlantic ports at the discretion of the shipper.”

Now I say that merely because they speak of a dollar rate for the cubic capacity of these vessels does not mean that you can ignore all of the other elements which have to enter into a contract between the carrier and the shipper and, very simply, if the discretion of the shipper were to carry these bananas not to the port of Philadelphia but to Portsmouth, Maine, then I submit that you cannot make any comparison between the rates or if it is the shipper's discretion to order the vessel to Jacksonville, Florida, first and then to come empty the rest of the way to the port of

Philadelphia, the mere fact that he states some rates in his proposal does not make those rates at all comparable to rates between fixed ports.

Examiner Robinson: Now let's get back to the 1304 question. Just in your own words paraphrase what you asked the witness because it will take you ten minutes to find it in the notes.

Mr. Kharasch: I asked him why they rejected this offer. It is as simple as that.

Mr. Giallorenzi: Do you want to answer it?

The Witness: Why shouldn't I answer it? There is nothing to hide.

Mr. Giallorenzi: If you think you can answer it, go ahead.

The Witness: Well, I can answer it. I was not in the meeting of the Board of Directors where this offer was presented, but if I had been there—

Examiner Robinson: Now, now, that is enough. You are well off. Just stop.

Mr. Giallorenzi: That is enough.

Mr. Rosenzweig: Has Minute No. 480 been introduced in evidence?

Mr. Kharasch: Yes.

Mr. Rosenzweig: Then I respectfully submit that Minute No. 480—

Examiner Robinson: We don't have to go any further. He says he doesn't know.

Mr. Roseizweig: It sets forth the position of the Board on the proposal.

1305 Examiner Robinson: We don't have to worry about that. He says he doesn't know, so you just drop it.

By Mr. Kharasch:

Q. Did you receive, Mr. Borrero, in the ordinary course of business a letter of June 21, 1957, to Consolo from your company's head office in Bogota, which is page four of Exhibit 25? A. Yes, I received it.

Q. Did you also receive, Mr. Borrero, a copy of a letter of March 25, 1957, which is marked as page 3 of Exhibit 25, being an earlier letter from Dr. Diaz to Mr. Consolo? A. Yes, we did.

Q. Were you informed of the action of your Board of March 10, Minute No. 480?

Mr. Giallorenzi: I don't see how this is relevant to this petition for a declaratory order.

Mr. Kharasch: We are not trying your petition for a declaratory order alone; we are trying that and my case.

Examiner Robinson: I am afraid this is so intermeshed you just can't separate them.

Mr. Giallorenzi: Would you show the witness the exhibit?

Mr. Kharasch: I think he has it. You have my copy, I believe.

Mr. Giallorenzi: What exhibit is that?

1306 Mr. Kharasch: That is Exhibit 18. I misstated the date. It is Exhibit 18. We have Minute No. 480 and Minute No. 482 of the Board of Directors.

The Witness: What is your question?

By Mr. Kharasch:

Q. Were you informed of that action of your Board of Directors? A. Well, the Board of Directors is not supposed to inform me as an employee of Transportada Gran-colombiana of what happened in the meeting. I knew that a contract had been extended, that the extension had been granted.

Q. Is it not true that the Board of Directors of your Company had decided to continue the contract of Messrs. Morey and Staff on the date of March 25, 1957, when they wrote to Mr. Consolo and said, "Your kind communication is being considered"?

Mr. Giallorenzi: I don't see how this is relevant.

The Witness: No.

Examiner Robinson: I think he said in the first hearing,

didn't he—I mean in New York—that he knew that before he saw the copy of the letter of what had been done?

Mr. Kharasch: Now I am asking if Grancolombiana didn't write to Mr. Consolo and say "Your offer is being considered" at the time when Grancolombiana had
1307 already decided to continue the contract with Messrs. Morey and Staff.

Mr. Giallorenzi: If you know.

The Witness: No, I don't know.

* * * * *

1315 By Mr. Kharasch:

Q. Did you, prior to July 11, 1958, communicate with either Mr. Consolo or—I will do some of Mr. Kurrus' work and ask you if you communicated with Banana Distributors and offered to them any of the space on your ship or even all of the space on your ship in the terms which are provided in the July 11 letter. A. Mr. Karasch—

Q. Now, let's answer either yes or no.

Examiner Robinson: Answer yes or no.

The Witness: No.

Examiner Robinson: While there is a lull, let's have a little recess and get the temperatures down.

(A short recess was taken.)

By Mr. Kharasch:

Q. Mr. Borrero, did you talk to Mr. Consolo in January or February, 1957? That would be prior to the time the Morey and Staff contract was coming up for renewal. A. Over the phone. He called me.

Q. Yes? A. I say yes; yes.

Q. And did you discuss with him at that time the fact that the contract was coming up for renewal and furnish him with some information by letter about the refrigerated space? A. He asked me for the purpose of bidding
1316 to give him the capacity of the refrigerated vessels in the service at that time because he wanted to bid

for the vessels on the expiration of the contract, when the option for renewal was up about July 20, 1957.

Q. And did you receive a copy of the letter which Mr. Consolo submitted to your Bogota office on March 5? A. Receive from whom?

Q. I don't think you received one from Mr. Consolo, but did you receive it from your Bogota office? A. Yes, I did.

Q. And following March 6, did Mr. Consolo speak to you by telephone from time to time? A. From time to time, yes, he called me.

Q. And did he inquire as to what was happening on his bid? A. No, I don't think that he called me to inquire about what happened to the bid he sent to Bogota. He was supposed to receive information from Bogota.

Q. When he called you, did he ask if you knew anything about what was happening to his bid? A. Well, if he called me, I may say that I didn't know, if I didn't know.

Q. And did you ever tell him by telephone what happened to his bid? A. I don't recall that I did.

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1319 Q. Did Panama-Ecuador tell you if you didn't give them that concession they would get off the ship?

Mr. Giallorenzi: The witness has already testified as to the reason why the concession was made.

Mr. Kharasch: No, he has not.

Examiner Robinson: This could be an additional factor that hasn't been discussed. I don't know that it is, but I mean it could be.

The Witness: You see, although I was a partner in the discussions, I cannot say whether they say that in those words or not, you see—those particular words that you have put in there—or whether they make any implication that I couldn't go forward with this the way it was.

Examiner Robinson: In other words, they implied that they might discontinue if they didn't have it?

The Witness: That they can't go forward.

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1320 By Mr. Kharasch:

Q. In the discussions leading up to the July 11 modification of the Panama-Ecuador contract, did Panama-Ecuador say or imply or did you understand that if they didn't get this modification they were going to get off the ship, break their contract and get off? A. I would say they implied that, yes.

* * * * *

1321 Q. Have you been aware of the decision of the Maritime Board in Docket 771 and 775 since it was made public on April 30, 1957? A. Yes.

Q. Were you aware of that decision when on May 22, 1957, you executed a three year extension of Panama-Ecuador's contract? A. Of the April 30 decision, yes. I mean I personally. I don't know about the others.

* * * * *

1335 Q. And you also said that Panama-Ecuador people said they would sue you. A. Yes.

Q. If you broke their contract. A. Yes.

Q. What are the dates of those conversations? A. No.

Q. Any idea at all? A. No.

Q. I will ask you to look once more at Exhibit 88. It is a letter from your Bogota office to Mr. Turino. A. Yes.

Q. We have several letters which are almost identical. Is that a form letter which the Company decided to send out to shippers? A. Yes.

Q. What is the meaning of paragraph "G" on page 2 asking shippers for "generally, any other information required which you deem necessary"? A. It is a letter addressed by Flota Mercante Grancolombiana, Bogota, and sent by my office and I can't say at the moment whether it was sent.

Mr. Giallorenzi: I prepared that letter. You can
1336 interrogate me on that. I will gladly take the witness stand.

Examiner Robinson: I don't think he is going to ask you.

By Mr. Kharasch:

Q. How soon after this letter was written in July, 1957, would your company be willing to give anybody any space on the ships? A. I don't know.

Q. No matter what they responded to such a letter? A. I can't answer that. I don't know.

Q. This letter of July 8 asking Turino Co. for some information, and you say ". . . we will be happy to advise you upon termination of the present contract so that you may favor us with your bid . . ."— A. If that is what the letter says, then that is the situation of the contract.

Q. Which is 1960, in July; is that right?

Mr. Rosenzweig: If not sooner cancelled.

The Witness: The answer is that if that is what the letter says, that is when the contract is cancelled.

Mr. Giallorenzi: I wish you would interrogate me on that letter. I prepared that letter and I will gladly take the stand.

Mr. Kharasch: I don't think you have to take the 1337 stand. Will you confirm for the record that Grancolombiana intended by that, in accordance with the terms of that letter, that Grancolombiana was not interested and would not give the space to anyone until 1960?

Mr. Giallorenzi: I will not, no.

* * * * *

1346 Mr. Giallorenzi: I told you Dr. Diaz was going to be here because these minutes go to the phase of reparations.

Examiner Robinson: Let's stop now and if there is anything to be taken up on that, wait until the eminent Dr. Diaz gets here.

Mr. Kharasch: Is he going to be here?

Mr. Giallorenzi: He is going to be here on the question of reparations.

Examiner Robinson: He said he was going to be here from the beginning.

Mr. Giallorenzi: These Board of Directors minutes go to the question of reparations.

Mr. Kurrus: He is not going to be here on the issue of common carrier?

1347 Mr. Giallorenzi: No, he is not. There is no need for him to be here on that.

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1350 **Jack Friedlander**

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

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1358 By Mr. Kharasch:

Q. Now, what about Panama Ecuador Shipping Corporation which holds the space on Grancolombiana? Where is that corporation organized and what is its function?

A. The Panama Ecuador Shipping Corporation is organized in Panama. The function of this company is to transport fruit from Ecuador to the United States, and at times we have engaged in other businesses. That is, the Panama Ecuador Shipping Corporation has engaged in other businesses besides bananas and shipping—

1359 Q. To be sure I have the chain right, the fruit is brought in Ecuador by this company whose first name is Exportadora? A. That's correct.

Q. It's then sold to Panama Ecuador which brings it up here? A. No, it's sold to Ecuadorian Fruit Import Corporation.

Q. And Ecuadorian Fruit Import Corporation uses Panama Ecuador Shipping Corporation to do the shipping? Is that right? A. That's correct.

Q. So Panama Ecuador Shipping Corporation does not touch the fruit at either end? A. Panama Ecuador Shipping Corporation is solely responsible for the transportation of the fruit.

Q. The present contract with Grancolombiana is held by Panama Ecuador Shipping Corporation? Is that right?
A. That is correct.

Q. And this contract was assigned to them by Messrs. Morey and Staff? A. Was assigned to them by Exportadora de Productos Ecuatorianos.

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1362 Q. Is the Ecuadorian Fruit Import Corporation the corporation which sells bananas to buyers in the United States? A. Yes, it is.

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1364 Q. Regardless of the particular dates, in October 1957, in addition to all the space available on the Grancolombiana Line, Messrs. Morey and Staff or
1365 Panama Ecuador obtained space on the Grace Line for about 3,000 stems a week? Is that right? A.
That is correct.

• • • • •
1441 Q. Does your total loading operation take between 13½ to 15 hours? A. That's correct.

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1812 **Jack Friedlander**

resumed the stand and testified further as follows:

Recross-Examination (Resumed)

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1613 By Mr. Dougherty:

Q. As we ended yesterday, I think you had testified, Mr. Friedlander, that you distribute your ripers solely in the Philadelphia area. A. Ripes and some turns. As we have discussed the problems, the ripe fruit or the turning fruit falls into many different categories of yellow.
1614 And there is some turning fruit that can ride, that is loaded for out of town. There is some turning fruit that can't ride; it is loaded for Philadelphia. And of

course the ripe fruit as classified on our out-turn reports is for Philadelphia.

Q. Now, did you tell us to whom you generally disposed of that ripe and local turn fruit? A. You want the names?

Q. No, not the names. Well, in these terms, do you have regular customers to whom you usually sell? A. Fairly consistently, regular customers I would say, sold to the same people 99 per cent of the time.

Q. I see. Now with respect to the fruit that you distribute beyond Philadelphia, do you also distribute that fruit to regular customers? A. More or less regular customers. We sometimes exchange customers during periods of changing markets with the East competing against New Orleans market or not competing against the New Orleans market, or competing against the Tampa market or not competing against the Tampa market; but generally more or less to a pretty fixed group of customers.

Q. That is you generally maintain a fairly consistent clientele? A. That is correct.

Q. Now, do these customers customarily buy 1615 bananas from other distributors? A. I would say the great majority of them buy from other importers.

Q. Do you make it a practice to sell bananas to customers who buy from importers, from independent importers, such as Banana Distributors? A. In our programming of sales, we try to avoid as much as possible the wholesaler or jobber who buys from small independents such as ourselves.

Q. Why? Why is that, sir? A. Generally I would rather compete against United or Standard than Banana Distributors, Andes, or Dixon, or any of the other small independents that fall into our category.

Q. For what reasons would you prefer not to compete with other distributors? A. Well, generally on a weakening market where the demand falls off as compared with the available supply, a small independent has a tendency to lower his price at a rate, or more accelerated rate and deeper than either United or Standard.

I can generally get a better price from customers who buy exclusively from Standard and/or United than customers—and ourselves, than customers who buy from Banana Distributors and ourselves, or Andes and ourselves, Dixon and ourselves.

Q. How do your customers divide as between those who buy from United and Standard and you and those
1616 who buy from other independents and you? A. I would say on a weighted basis, this is just a rough estimate—I would have to look at some figures before I gave you an exact answer—I would say that somewhere around 70 or 75 per cent of our customers buy from Standard and/or United and ourselves, and not from the other small independents.

Q. Now as to those customers who do buy from other small independents, do they also buy from Standard and United? A. Yes, in all cases.

Q. Then from what direction, from what sources in your judgment does the principal competitive force come in the market in which you sell these? A. Primarily United, and secondarily Standard.

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1752

Jose J. Borrero

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

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1778 By Mr. Kurrus:

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Q. This paper, “memorandum” it is called, starts off by saying, and I am quoting from the comments made by Mr. Friedlander: “We cannot continue shipping fruit from Ecuador to the United States because, for reasons which have not been established as yet but which may be the results of excessive dampness originated from severe

winter or parasites, said fruits arrive with spots which appear to grow from inside towards the 1779 outside during the days taken by the voyage and which makes the fruit unsalable."

Did Panama-Ecuador request to stop shipping bananas altogether? A. Yes.

Q. They did? A. Yes. They sent a letter saying they won't be able to ship bananas.

Q. At all? A. Yes.

Mr. Rosenzweig: Let's fix the date of that letter.

The Witness: I mean that is the letter, it is here in the evidence.

Mr. Dougherty: I don't believe it is in the document.

The Witness: Not in that paper, but before—

Mr. Rosenzweig: You don't know whether that letter was dated before or after Mr. Zevallos' report?

The Witness: No, I would have to see the letter.

By Mr. Kurrus:

Q. Do you have the letter which states Panama-Ecuador wanted to stop shipping bananas altogether?

Mr. Dougherty: Just one moment.

May I ask the witness if this is the letter?

(Document handed to witness)

The Witness: Yes, this is one I was referring to, yes.

1780 Mr. Dougherty: The letter the witness is referring to is a letter dated May 6, 1958, from Mr. Friedlander to Flota, which I believe is in evidence as a part of Exhibit 19.

Mr. Rosenzweig: Was there a series of letters?

Mr. Dougherty: Yes, there was a series of letters.

• • • • •
1801 Q. Did you consider the steps you might take if the Federal Maritime Board were to decide that you had to open your space to several shippers? A. Well, this

is trying to read the mind of the Federal Maritime Board. We presented our problem to the Federal Maritime Board.

Q. But did you consider the possibility that the Board might declare you to be a common carrier?

Examiner Robinson: In other words, did you discuss with anybody what might be your course in case the Board decided that you had to let everybody ship?

The Witness: Yes, we have been thinking about it.

By Mr. Kurrus:

Q. Did you have any studies made with respect to what action you might take if you had to open your vessels to several shippers? A. Not particularly.

Q. But you did have discussions on the problem? A. Well, I suppose in a way. We have been thinking if the Maritime Board said we are supposed to open the space, then we will have to face how we can open the space, you see.

Q. And how will you open the space if the Board should declare you to be a common carrier? A. We don't know. So far as making it individually with 1802 different people, that is no problem. It is a matter of loading. The problem is loading and unloading the vessels.

Q. Do you have any idea of how you will make the space available? A. No. For us still that is a big problem. How can you handle the vessel with the same speed, the same speed for the loading and unloading of the vessel, because we haven't done it. We don't have any experience on that.

Q. And you have never investigated the situation on the Grace Line to see whether you might learn something from that? A. Well, we know that the Grace Line vessels are a little different to our vessels.

Q. But you haven't attempted to talk the situation over with anybody in Grace Line? Let me ask you, have you talked to anybody else in the Grace Line with respect to this problem other than Mr. Magner? A. With respect to what particular problem now?

Q. The problem of taking on several shippers. A. No.

Q. Have you talked the problem over with Panama-Ecuador Corporation? A. Well, I will say we have talked to Panama, yes.

Q. Do you have any correspondence with them? A. No.

Q. Did you consult Panama-Ecuador Corporation 1803 prior to filing your petition for a declaratory order?

A. About what?

Q. Did you consult with that? A. About what line? In what respect?

Q. To ask their opinion with respect to the filing of this declaratory order. A. You refer to where you come to or where to file the declaratory order?

Q. No. At the time you filed your petition for a declaratory order, or the time you were considering filing it, did you discuss the matter with Panama-Ecuador Corporation? A. No, I don't remember that we discussed with them or consulted with them whether we should present or not a petition for declaratory order.

Q. Did you tell them you were going to file such a petition? A. They received a copy of the petition.

Q. But prior to the time of receiving a copy, did you consult them? A. I don't recall, no.

Q. You don't recall? A. No.

Q. Do you have any objection to opening the space to Banana Distributors and Mr. Consolo, provided that your loading time is not substantially increased? 1804 A. We have no objection to opening the space to anybody if—I mean if loading can be accomplished and the unloading accomplished.

Q. If the Board should declare you to be a common carrier and should require you to accept the bananas of more than one shipper, would you intend to stop the carriage of bananas? A. If the transportation of bananas isn't practical, we have to stop it.

Q. But in any event you would try it, would you not? You would give it a try, wouldn't you? A. That is a very

difficult question. We expect what the Board decides is the right thing to do. If they are going to decide with full knowledge of what they are deciding, we are law abiding people.

Q. In other words, if they should decide that you have to accept the bananas of more than one shipper, you will accept the bananas of more than one shipper. Is that true? A. I am not going to say here that I am going to go against the order of the Board.

Q. You could stop the carriage of bananas? A. If it isn't practical, yes. If we can't carry them the way it is supposed to be carried, we have to stop.

Q. The only thing I am asking you is you would give it a try if that is the order of the Board. Isn't that true? A. I would say so.

Q. Do you have any letters from Panama-Ecuador Corporation stating that they would insist on their contract being carried out and would sue you if it were broken? A. No.

Q. Did they ever state that? A. Yes, they did.

Q. Who stated that? A. Mr. Staff.

Q. Mr. Staff? A. Yes.

Q. When did he state that? A. Well, I don't have a recollection of the particular date, but it is something he stated, and you can ask him whether he stated it or not.

Q. Was it approximately after you filed your petition for a declaratory order? A. Before.

Q. He didn't state that in May of 1958, did he? A. No.

Q. Do you know how long it ordinarily takes for Panama-Ecuador Corporation to complete its loadings of bananas? A. I think that the contract requires 16 hours.

Q. Do you know whether they normally complete the loading in less time? A. Within the time prescribed in the agreement.

Q. Do you know whether you have ever charged them a penalty for taking over 16 hours? A. No, I don't recollect.

Q. Do you have any special knowledge of banana loadings and banana unloadings? A. No. I haven't been in Guayaquil when they load bananas.

Q. You have never seen them load them? A. No.

Q. Do you know whether it would take more than 16 hours if three shippers were to use the Grancolombiana Line ships? A. I don't know.

Q. Has Grancolombiana Line ever conducted a study to determine whether it would take more than 16 hours if three shippers would use the vessels, three banana shippers? A. I don't know any study being conducted on that.

Q. Then I suppose it is true that you do not necessarily prefer to do business with one shipper rather than three banana shippers, provided that the loading time would not be substantially increased? A. It is a very difficult question because it is better to deal with one than with three in any facet of negotiations. It is less problems.

Q. I recognize that there may be certain advantages 1807 to dealing with one rather than three, but if you can accommodate three shippers and satisfactorily meet your schedule requirements and obtain as much or more revenue, I take it that Grancolombiana Line does not insist on dealing with one shipper rather than three shippers? A. If we are going to make more money, the more money will pay for the problem, I suppose.

Q. If you can make more money, you would rather deal with three? A. If it can be carried out in the way you put it, within the limit that we have assigned in this schedule for that operation, I would say yes.

Q. If you could make more money, you would rather deal with three? A. If I can do it, yes.

Q. Now, in the contract that you have with Mr. Staff and Mr. Morey, Exhibit 15, I refer you to page 13, paragraph 14, of that contract, which is a provision providing in effect that if the contract should be unimpossible for any reason that you can terminate it. Was that provision insisted upon by Grancolombiana? A. That is a provision that is being used in banana contracts for a long time prior

to this contract, that provision put by us in here, by Grancolombiana.

1808 Q. That was put in by you? A. Yes.

Q. On the advice of your attorney? A. I think

so.

By Mr. Kurrus:

1809 Q. Prior to the filing of the petition for a declaratory order in October 1957, do you recall whether Grancolombiana Line had considered filing such a petition prior to that time? A. The petition was filed, as I think I explained here, when we started receiving requests for space based on the Federal Maritime Board order sometime in August 1957. We came to Washington in September, I think, to the Federal Maritime Board, to see Mr. Tibbett, with the purpose in mind of explaining to the Maritime Board that we have a contract for the carriage of bananas, on one hand, and on the other the request from shippers for space, basing their request on the order issued by the Federal Maritime Board. We hoped that we were going to get a quick answer or ruling on the matter. We were told no, they couldn't rule on that thing across the board. Then we decided to present the petition for a declaratory order. That is the story of the declaratory order.

Q. But you came down to see Mr. Tibbett sometime in September, as you recall? A. It was sometime the beginning of October or the end of September. I don't recall the date. The date is some place written.

Examiner Robinson: Nevertheless, it was shortly before you filed your petition?

1810 The Witness: It was before, yes.

Mr. Dougherty: I can supply the exact date.

The Witness: October 1, 1957.

By Mr. Kurrus:

Q. Did you have any correspondence with Mr. Tibbett?
A. No.

Q. Do you recall what Mr. Tibbett told you? A. He listened to our problem, but he didn't make any recommendation.

Q. Now, with respect to these letters for space which prompted you to file your petition for a declaratory order, do you know any of the people from whom you received such requests for space to be responsible and experienced banana importers? A. We did not investigate as to the financial qualifications of anybody at that time.

Q. And you didn't know whether any of them were actually bona fide importers? A. We didn't make any investigation.

Q. Now, when people wrote to you for space is it true that the procedure was for you to first of all acknowledge their letter and then for you to write them a form letter that had been prepared by your attorney, asking them to answer certain questions? A. That letter was sent 1811 by Flota Mercante Grancolombiana, asking for information about the people who wrote letters.

Q. I see. The procedure was for you to send the letter and say you were forwarding it down to Bogota, and Bogota sent the form letter back that had been prepared by Mr. Giallorenzi. Is that true? A. I think so, yes.

Q. Now, I show you a letter dated September 9, 1957, to Banana Distributors, which is that form letter that Mr. Giallorenzi penned and was sent out from Bogota whenever anybody wrote in. Would it have made any difference with respect to the demand for space if anybody had answered specifically each one of those questions involved? A. Let me say this to you, Mr. Kurrus. It is very plain, very simple to see our procedure here. We came to the Federal Maritime Board for a ruling in our situation. We felt even that this ruling was going to be a month or two

months after we presented the problem. Now, we don't know what the Maritime Board are going to rule.

Q. You didn't know. I see. A. You received a request from somebody. You tell this somebody, "We presented a petition, gentlemen. At this very moment we have a petition for a ruling at the Federal Maritime Board. Once we hear about this ruling we will get in touch with you." The other thing is we gather here the information

about the people that are interested in this space, so 1812 if the Maritime Board rules that we have to open up the space and the space can be opened, then we have the information on hand to deal with these people.

Examiner Robinson: You were just looking to the future in case you had to do it?

The Witness: Yes, and be prepared for anything, you see. We also thought that when we came to the Maritime Board, we explained to the Maritime Board our obligations as far as the contract and what our capabilities in so far as being able to carry bananas.

By Mr. Kurrus:

Q. Nobody would have gotten on the ships no matter how they answered these questions? A. Until the Maritime Board—Until we hear from the Maritime Board we are not going to do anything.

Q. Now, on October 7, 1957, Mr. Policarpo—Do you know him? A. No.

Q. Mr. Policarpo? A. Oh, Policarpo.

Q. Sure you know him. Mr. Policarpo wrote to—Is that his first name or last name? A. The first name. His last name is Gutierrez.

Q. He wrote to Banana Distributors, acknowledging their letter of September 16, and advising, and he states 1813 he advises that the available reefer space on our vessels has been committed for the next two years. Is that true, the next two years? Was your space committed up to October 7, 1959, at that time? A. No. The

contract that Grancolombiana holds with Ecuadorian Fruit Company goes to 1960, sometime in July, unless sooner terminated.

Q. So you don't know what he was referring to when he said that it had been committed for the next two years?

A. He was not quite precise on the date, yes.

Q. And then he goes on to say: "Of course, we shall be pleased"—that means happy—"at the end of said term to consider your application for allotment of space on our vessels."

Now, if you know, I would like you to tell me whether that means that they were considering that they would allocate the space between shippers at that time.

Mr. Dougherty: If you know.

Mr. Kurrus: If you know. If you don't know, don't answer.

Mr. Dougherty: If you don't know, say so.

The Witness: I don't know the meaning of the letter.

1816 Q. Do you operate a service similar to Grace Line's? A. Similar in what respect?

Q. Similar with respect to the carriage of northbound commodities. Would you say that your service is similar to Grace Line's service from the west coast of South America, other than the fact that they go down to Chile?

A. They have also passenger service, you see.

Q. But would you say that their freight service is similar to your service, that you operate in a similar way?

Examiner Robinson: Just in general.

1817 A. Yes, I think so, yes.

By Mr. Rosenzweig:

1823 Q. Isn't it a fact that Mr. Noboa loads your vessels which are in the Gulf service? A. I understand he is loading the Gulf vessels.

Q. He is loading the Grossman vessels? A. Yes.

Q. Those are your vessels in the Gulf? A. Yes.

Q. And you are aware of the fact, are you not, that Mr.

1824 Noboa also submitted a proposal requesting space on the Flota vessels in or about March of 1957? A. I know that, yes.

.

1826 Q. So that the transit time from Guayaquil to Philadelphia is still 12 days for the most part? A. Eleven days.

Q. Which is it, 11 or 12 days? A. Eleven days, I think.

.

1856 By Mr. Kurrus:

Q. When you went to the Federal Maritime Board in September of 1957, who instructed you to go there? A. The General Manager of Flota, Diaz, came to the Maritime Board. I accompanied him.

Q. Dr. Diaz went there? A. Himself, yes.

Q. Do you always sail your vessels at the maximum speed? A. The instruction of the vessel is to proceed to the next port of call at a maximum speed consistent with the safety of the vessel and the cargo. This is a general instruction.

Q. It is true, is it not, that the main obstacle to your opening up the space to several shippers has been the outstanding contract with Panama-Ecuador? A. No, I wouldn't say so. I think that I tried to put here the position of the company in as few words as possible, plainly, you see. We came to the Board to tell the Board,

1857 "Gentlemen, we have here a contract that we entered into in good faith with these people, and we have here a request from people asking for the space. If we don't give these people the space, they are going to sue for reparations. If we cancel this contract, these people are telling they will sue us if we cancel the con-

tract." Now we come here to the Board to tell the Board our problem and offer the Board all our technical information or information of our vessels for the Board to study, and in their good judgment and their wise thinking decide what to do. The problem, if you allow me, Mr. Kurrus, is very simple. The problem is not the past. The past is behind us. What happened is behind us. The problem is the future, what we are going to do tomorrow, day after tomorrow. Then the important thing is for the Board to listen and see what the vessel can do, and then we have to do what the Board decides or not go any longer in the business. If it is established and determined that we can carry one thousand different shippers, these vessels can carry one thousand different shippers, and there is one thousand different shippers and we are supposed to give the space to one thousand different shippers, we will give the space to one thousand different shippers. If you allow me, I see in this two parallels. There is certain evidence or testification here that says you must not put in those vessels more than one shipper. You will delay the loading up to 30, 40, 50 hours. On the other hand, there is

other information, another concept or opinion that 1858 says you will not take more than 30 minutes. Then

in my humble opinion what I would do is trust this man who is telling the truth because of his experience or trust this other gentleman here who has no Grancolombiana vessel but he is a wizard in the banana business and knows about the business, what to do—30 minutes, 30 hours. You have the vessels to load. The vessels are there. See how they can be loaded. The vessels come here. See how they can be unloaded. Go there and decide. We don't want to block any intention of the Board. We want to abide by the Board decision.

Examiner Robinson: I think it is perfectly clear what Mr. Borrero's position is. I don't think we need to go into it. I think he has explained it thoroughly.

Mr. Kurrus: That wasn't the question I asked, but I thought it was a good answer.

Examiner Robinson: I do, too. It is a full answer.

1891 Mr. Dougherty: Grancolombiana also does not want to substitute oral argument for briefs. These cases are all of the utmost importance to Grancolombiana. We feel entitled to the opportunity to examine the transcript when it is available, to analyze it, to analyze the evidence, and to make a reasonable statement of our position. I don't think that is possible in an oral argument off the cuff, an extemporaneous kind of presentation. The net result in terms of clarifying the issues, it seems to me to be only confusion. It is just as important to Grancolombiana that it be given the opportunity to make a statement of its position as it is to the other parties to have a more expedited handling of the case. Grancolombiana wants the case to proceed on briefs and in the usual fashion for which the rules provide. We are, of course, willing to cooperate within that limitation to suit the convenience of all parties. In addition, the procedure suggested I am sure would be most inconvenient for Grancolombiana's counsel.

1892 Examiner Robinson: I consider this a big case, and I think the Board might very well criticize me for not getting a record and also for not waiting until this transcript is finished. This isn't something that you can just kick around, and of course I don't mean that as any reflection on you people at all. Where you have so much at stake and you haven't even gotten all the transcript, I would not be justified in having an oral argument like that. I would like to expedite it as much as I can, and I assure you once the record is in I will start right to work on it, because I have no other case ahead of it.

Exhibit 1**FLOTA MERCANTE GRANCOLOMBIANA, S.A.**

Statement as to When Each of Our Vessels Entered the
Banana Trade Between Ecuador and United States
North Atlantic Ports

CIUDAD DE QUITO	December 26, 1949
CIUDAD DE MEDELLIN	July 5, 1951
CIUDAD DE MANIZALES	April 3, 1953
CIUDAD DE CALI	August 26, 1953
CIUDAD DE IBAGUE	November 29, 1953
CIUDAD DE TUNJA	July 29, 1957
MANUEL MEJIA	February 3, 1958
CARTAGENA DE INDIAS	May 17, 1958
CIUDAD DE PASTO	July 5, 1958
CIUDAD DE BARRANQUILLA	July 21, 1958

Source: Supplied by Grancolombiana

Exhibit 2**ENCLOSURE NUMBER ONE**

Vessel	Cubic Feet Capacity	Cubic Feet Per Stem	Capacity—Stems
CIUDAD DE QUITO	U.T.D. 15510	5 cub. ft. per stem	3,102
	L.T.D. 11420	5 cub. ft. per stem	2,284
	L.H. 16190	5 cub. ft. per stem	3,238
	Total 43120		8,624
CIUDAD DE MANIZALES	L.T.D. 11420	5 cub. ft. per stem	2,284
	L.H. 16190	5 cub. ft. per stem	3,238
	Total 27610		5,522
CIUDAD DE CALI & CIUDAD DE IBAGUE	U.T.D. 19565	4.7 cub. ft. per stem	4,162
	L.T.D. 17660	4.7 cub. ft. per stem	3,757
	L.D. 24890	4.7 cub. ft. per stem	5,297
	Total 62115		13,216
CIUDAD DE MEDELLIN	U.T.D. 18560	4.7 cub. ft. per stem	3,949
	L.T.D. 13580	4.7 cub. ft. per stem	2,872
	L.H. 23880	4.7 cub. ft. per stem	5,082
	Total 56020		11,903
CIUDAD DE TUNJA & MANUEL MEJIA CARTAGENA DE INDIAS CIUDAD DE BARRANQUILLA CIUDAD DE PASTO	U.T.D. 15990	4.4 cub. ft. per stem	3,629
	L.T.D. 20650	4.4 cub. ft. per stem	4,693
	L.H. 18360	4.4 cub. ft. per stem	4,173
	Total 55000		12,495
CIUDAD DE CUENCA & CIUDAD DE POPAYAN CIUDAD DE NEIVA CIUDAD DE SANTA MARTA	U.T.D. 21200	5 cub. ft. per stem	4,240
	Total 21200		4,240

Source: Supplied by Grancolombiana

Exhibit 6**ASSOCIATION OF WEST COAST STEAMSHIP
COMPANIES AGREEMENT**

THIS AGREEMENT made in Cristobal, Canal Zone, by and between the parties signatory hereto on the 25th day of July in the year One Thousand Nine Hundred and Thirty-four.

WITNESSETH :

That the parties hereby associate themselves together in a Conference to be known as the Association of West

Coast Steamship Companies to promote northbound commerce from Pacific ports of Colombia or Ecuador to (a) Cristobal or Balboa, (b) United States ports on the Atlantic Coast, Pacific Coast (including Alaska) or Gulf of Mexico, or in the West Indies, Hawaii, Philippine Islands, or other island territories or possessions of the United States, by direct vessel or with transshipment at Cristobal or Balboa and/or at any other intermediate port, (c) any port of destination on the North American Continent or elsewhere not hereinbefore referred to except ports of destination under the jurisdiction of the European/South Pacific and Magellan Conference, which latter conference has jurisdiction over traffic destined to United Kingdom or Continental European ports, or transhipped at said ports for ports of destination in Asia, Africa, Australasia and to Peruvian and Chilean ports, also ports on the East Coast of South America via Straits of Magellan, and (d) between ports in Colombia and/or Ecuador for the common good of shippers and carriers by providing for just and equitable cooperation between Steamship Lines engaging in the transportation of such commerce, and to the accomplishment of this end the parties hereto severally agree with each other as follows:

1. A conference is hereby established to be known as the Association of West Coast Steamship Companies and the common carriers by water signatory to this agreement hereby become members of said conference. This conference shall, to the extent and in the manner hereinafter provided, have jurisdiction over and deal with the transportation of northbound cargo from Pacific ports of Colombia or Ecuador re destinations as defined above.

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Journal of Commerce - 6/24/55

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ON 21. UNDER THE FOLLOWING SIGNS AND
for Vermilion River.
CHESAPEAKE BAY—Tangier Sound—
Big Annapessex River—Buoys changed.—
1. Big Annapessex River Channel Buoys 1
and 3 have each been changed to a second-
class special can painted black equipped
with a white reflector.
Approx position, Buoy 1: 38 03 09 N.
75 33 19 W.
2. Big Annapessex River Channel Buoys
3 and 4 have each been changed to a
second-class special nun painted red
equipped with a red reflector.

ROBIN LINE

American Flag Sailings
to

South & East Africa

We are interested in receiving offers for the
carriage of bananas from Ecuador to New
York in the refrigerated space of our vessel.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Agent: Transportadora Grancolombiana, Ltda.
52 Wall St., New York, New York WH 3-7202

REVERE WARE

Journal of Commerce - 6/27/55

EXTENDING
Low, 675

ANSWER-
answering
Y. 45th st.

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INC. capd.
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CAR INC.
40 W. 31st

dry goods;
d. 100 apx.

real estate;
60 W. 4th

P. automo-
4th st. 200

COOP. con-
110 William

**WM. SPENCER & SON
CORPORATION**

Phone: BOWling Green 9-4410
19 RECTOR ST., N. Y. 6, N. Y.

• Freight Handlers
• Export Packers
• Cargo Repairs
• Rebagging

Strapping
Marking

Foreign Freight Traffic
233 Broadway, N. Y. • CO 7-0546

—other offices in
principal cities.

Canadian Pacific

We invite your offers for the carriage of
bananas in our refrigerated vessels from
Guayaquil to New York subject to our
terms and conditions. All offers to be
submitted on or before June 30, 1955.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Agent: Transportadora Grancolombiana, Ltda.
52 Wall St., New York, New York WH 3-7202

Source: Supplied by Grancolombiana

AD RUNNING EVERY OTHER WEEK IN THE SHIPPING DIGEST AND THE FORWARDER

SHIP VIA Grancolombiana

COLOMBIA, ECUADOR, PERU,
MEXICO, CUBA AND
CENTRAL AMERICAN PORTS

8 SEPARATE AND DIRECT SERVICES

WEEKLY FROM
NEW YORK • PHILADELPHIA
BALTIMORE

To Barranquilla, Cartagena,
Pto. Limon, Pto. Barrios

SEATTLE BOLTER	WARDEN	May 12
Baltimore May 8	Baltimore May 13	
Philadelphia May 6	Philadelphia May 15	
New York May 9	New York May 16	

(Also calls Santa Marta)

To Buenaventura, Guayaquil,
Callao, Mollendo/Matarami

CD. DE TURIA	New York May 9
CD. DE WENDELIN	CD. DE TRAGUE
Baltimore May 8	Philadelphia May 15
Baltimore May 9	Baltimore May 16
New York May 16	New York May 13

(Also call Ponce de Leon, Chimbote, Salaverry, Pisco, Lima)

Also calls Rio Hondo cargo direct or transhipped as cargo offers.

To Santos—See Canadian Service

*Refrigerated cargo space available.

Agents
PHILADELPHIA BALTIMORE
New York Co. Penn-Maryland Steamship Co.
JUL 5-5888 LEXINGTON 4-7794

GULF SERVICE TO

Pto. Barrios, Pto. Limon,
Cartagena, Barranquilla

TAULUST BOLTER	GEORG RUSSE	May 14
Baltimore May 7	Baltimore May 16	
Cartagena May 9	Cartagena May 16	
New Orleans May 15	New Orleans May 20	

(Also calls Santa Marta)

To Buenaventura, Guayaquil, Callao

CD. DE KEIVA	New Orleans May 9
CD. DE POPAYAN	CD. DE MANIZALES
Cartagena May 14	Cartagena May 23
Baltimore May 15	Baltimore May 26
New Orleans May 20	New Orleans May 30

Also call Ponce de Leon, Chimbote, Salaverry, Pisco, Lima.

Maria and Tomasa cargo direct or transhipped as cargo offers.

*Refrigerated cargo space available.

NEW ORLEANS AND HOUSTON

Texas Transport & Terminal Co., Inc.

CANADA AND U. S. PORTS

To Colombia, Ecuador, Peru

JEFFREY	May 24	PL. ALFRED	May 28
Baltimore May 24	Baltimore May 28	Baltimore May 31	
Three Rivers May 26	Three Rivers May 28	Three Rivers May 31	
Quebec May 27	Quebec May 28	Quebec May 31	

(Also call Cartagena, Barranquilla, Buenaventura, Guayaquil, Callao, Mollendo/Matarami.)

(Plus other Panamanian ports as cargo offers.)

To Havana, Veracruz, Tampico

DALBEK	A VESSEL
Baltimore May 9	Baltimore May 27
Three Rivers May 10	Three Rivers May 28
Quebec May 12	Quebec May 29
PL. ALFRED May 15	PL. ALFRED May 30
Boston May 16	Boston June 3

Agents
MONTREAL and TORONTO BOSTON

The Robert Bedford Co., Ltd. Boston Shipping Corp.
(North 2-4085)

PACIFIC COAST SERVICE

To Buenaventura, Guayaquil,

Callao, Mollendo/Matarami

RIO MAGDALENA	CD. DE BOGOTA
Seattle May 5	Portland May 14
Vancouver May 9	Seattle May 16
San Francisco May 13	Vancouver May 23
Los Angeles May 15	San Francisco May 27
	Los Angeles May 30

Call Tomasa and Maria as cargo offers.

*Refrigerated cargo space available.

To Acapulco, San Jose de Guatemala,
La Libertad, Puntarenas, Cartagena,
Barranquilla

ELLERBEK	TARDENBEK
San Francisco May 6	Portland May 10
San Francisco May 9	Seattle May 12
	Vancouver May 15
	San Francisco May 20
	Los Angeles May 24

Cells of Buenaville, Callao, Corbeta, San Jose del Sur as cargo offers.

Agents

LOS ANGELES

Bedford, Guller & Co.
Telephone 9022

SAN FRANCISCO

Bedford, Guller & Co.
GARFIELD 1-6648

FLOTA MERCANTIL

Grancolombiana


General Agents
TRANSPORTADORA
GRANCOLOMBIANA
LTDA.



NEW YORK CHICAGO DETROIT
79 Pine Street 300 So. La Salle St. 1300 Bank Bldg.
WHOLESALE 3-7309 6-2400 6-2530 WHOLESALE 1-3300

Source: Supplied by Grancolombiana as typical advertising

Established 1850



NEW YORK

**BUENAVENTURA, GUAYAQUIL,
CALLAO, MATARANI/
MOLLENO**

RIO MAADALENA

San Francisco May 13
Los Angeles May 15

CD. DE BOGOTA

Ferried May 14
Seattle May 15
Vancouver May 22
San Francisco May 27
Los Angeles May 31

Cam Tacoma and Mouth as cargo
officer.

RECEIVED cargo upon arrival.

**ACAPULCO, SAN JOSE DE
GUATEMALA, LA LIBERTAD,
PUNTARENAS, CARTAGENA,
BARBANQUILLA**

TARPENWEEZ

Vancouver May 12
San Francisco May 15
Los Angeles May 20
" Manzanillo May 24

AGENTS

Belvoir, Guthrie & Co., Ltd.

SAN FRANCISCO
101 California St. 250 West 4th St.

PERU

now to be served

WEEKLY by GRANCOLOMBIANA
from Philadelphia, Baltimore and New York

NEW YORK-EAST COAST & WEST COAST COLOMBIA-ECUADOR-PERU

SOUTHBOUND

[illegible]

Note: Sailings from Philadelphia* and Baltimore are listed under **NORTHBOWN**.

• As Cargo Officers

† Vessels Will Call at Peruvian Intermediate Ports as Cargo Offload

..... have no large effect

NORTHBOUND

[illegible]

• **As Cargo Offers**

† Vessels Will Call at Peruvian Intermediate Ports en Corps Offens

(Subject to Change Without Notice)

TUMACO

**The Port of Tumaco
will be served with a
special service to and
from all U. S. and
Canadian Atlantic
ports every 25 days.**

ship via

AGENTS

NEW ORLEANS and HOUSTON:
Texas Transport & Terminal Co., Inc.

PHILADELPHIA: Lavino Shipping Co.

LOS ANGELES: Balfour, Guthrie & Co., Ltd.

SAN FRANCISCO: Balfour, Guthrie & Co., Ltd.

MONTREAL: Robert Reford Co., Ltd.

BOSTON: Boston Shipping Corp.

BALTIMORE: Penn-Maryland S.S. Corp.



General Agents

**New York
79 Pine Street
WHITEhall 3-7200**

Detroit
1355 Book Building
Woodward 1-3399

See ship card #78 for Gracelombiana's other services.

Exhibit 15

AGREEMENT entered into this 20th day of July, 1955, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation with its principal place of business in the City of Bogota, Republic of Colombia, S. A. (hereinafter called "GRANCOLOMBIANA"), acting herein through its duly authorized Agent, the North American Division of TRANSPORTADORA GRANCOLOMBIANA, LTDA., a Colombian limited liability company authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and Mr. Leonard Morey, of 383 Lafayette Street, New York, New York and Samuel G. Staff, of 415 Fifth Avenue, New York, New York, (hereinafter jointly called "lessee").

WITNESSETH

1. GRANCOLOMBIANA agrees to lease to lessee the refrigerated space existing at the present in the hold #3 of its vessels known as "CIUDAD DE MANIZALES", registered in Colombia, S.A., "CIUDAD DE QUITO", registered in Ecuador, S.A., "CIUDAD DE MEDELLIN", "CIUDAD DE CALI" and "CIUDAD DE IBAGUE" registered in Colombia, S.A., for the transportation of bananas from Guayaquil or Puerto Bolivar or Esmeraldas, Ecuador, S.A., to Philadelphia, Pennsylvania, U.S.A., on all northbound trips made by such vessels from said Ecuadorian ports, via Buenaventura, Colombia, to New York, New York, U.S.A., and lessee hereby hires all such refrigerated space under the terms and conditions hereinafter stipulated.

• • • • •

3. The schedule of sailings of the aforesaid vessels or any of them shall, at all times, be subject to the complete disposition and control of GRANCOLOMBIANA as to all circumstances connected with said sailings, including but without any limitation, the time, date and hour, and place of departure, the various ports of call, and the time, date

and hours, and place of arrival, as well as replacement, cancellation and/or substitution of vessels; however, GRANCOLOMBIANA agrees to expedite the sailing of the subject vessels from Guayaquil, Puerto Bolivar or Esmeraldas upon completion of the loading of bananas and to run them in their northbound voyages, from Guayaquil, Puerto Bolivar or Esmeraldas to Philadelphia, reserving only its right to call at any intermediate South American ports for a total period of time not exceeding thirty-six (36) hours. It is estimated that within normal conditions these vessels will make this run, between Guayaquil, Puerto Bolivar or Esmeraldas and Philadelphia in a maximum of 12 days, it being understood that GRANCOLOMBIANA will use its best efforts to have one of the vessels herein referred to in this Contract, arrive in Philadelphia every calendar week; should any vessel herein named make this run, within normal conditions, in more than twelve (12) days, counting said period from the date and hour of its departure from its port of loading bananas under this agreement, then GRANCOLOMBIANA shall pay lessee for each hour or fraction thereof beyond said period of twelve days at the rate of U.S.\$100.00 per hour or fraction thereof.

• • • • •
 5. Lessee agrees to pay GRANCOLOMBIANA, for the use of the refrigerated space of the vessels subject of this contract, free in and out to said vessels, as follows:

• • • • •
 (f) All the above established hire rates include the use of vessel's gear and power, but are exclusive of any and all expenses in connection with loading and unloading operations which shall be, in their entirety, for the account and risk of lessee. These expenses shall include, but not be limited to, receiving, loading, stowage, checking in, un-stowage, unloading, checking out, delivery, lights for overnight work, cleaning of wharves where the bananas have been handled, cartage of bananas rejects and debris, and

rental of mechanized shore equipment used in either loading or unloading operations.

6. As stated in Clause #5, loading and unloading operations shall be for the exclusive account and risk of lessee. Lessee shall load and stow the bananas placing in ship's reefer hold the number of stems which he considers proper.

7. GRANCOLOMBIANA shall give lessee or his agent at his home office address in Guayaquil, at least forty-eight (48) hours in advance, final notice in writing of the expected day and hour in which to begin the loading of bananas. It is understood that at such hour the ship's hold should be ready for the receiving of bananas as stated in Clause #11, otherwise, the time allowed to lessee for loading shall be counted starting only from the moment that the hold is ready.

8. As stated in Clause #5, unloading operations shall be for the exclusive account and risk of lessee, said unloading operations to be performed at GRANCOLOMBIANA's piers in Philadelphia if delivery of cargo is to be to Philadelphia and subject to the conditions hereinafter stipulated.

Unloading operations shall be performed under lessee's exclusive directions and supervision, and GRANCOLOMBIANA will not intervene or take any part in the performance of such unloading operations either in the hiring of labor or the corresponding payment of wages and the like.

11. GRANCOLOMBIANA agrees that not less than twenty-four (24) hours before readiness to load, the temperatures in the compartments to receive the bananas will be reduced to about 54 degrees Fahrenheit and maintained at that temperature until the holds are opened. During loading the temperature of the delivery air, as far as possible, will be maintained at 51 degrees Fahrenheit.

Temperature instructions may be changed as circumstances require by written request of lessee.

Upon completion of loading and closing of the compartments, the temperature of the delivery air will be reduced as quickly as possible, but not more than approximately one degree per hour, to about 54 degrees Fahrenheit. During the remainder of the voyage, so far as possible, the temperature of the delivery air shall be maintained at about 51 degrees Fahrenheit, and the return air about 56 degrees Fahrenheit, or at such other temperatures as lessee may direct in writing from time to time.

GRANCOLOMBIANA agrees to install in all vessels, as soon as possible, to the extent required in each of them, recording thermometers and temperature control instruments in at least five (5) recording points in each refrigerated hold. Upon completion of each voyage and arrival of vessel at the port of unloading, GRANCOLOMBIANA shall furnish lessee with a chart showing the recorded temperatures covering the period from twenty-four (24) hours before loading to the arrival of the vessel at the port of discharge.

Nevertheless, it is expressly understood and agreed that, unless shown to have been caused by negligence of GRANCOLOMBIANA as to which GRANCOLOMBIANA is not by law entitled to exemption, GRANCOLOMBIANA shall not be held responsible for the quantity, quality or condition of the bananas carried nor for any loss or damage occasioned by inherent defect or vice in the bananas shipped, by temperature, refrigeration, defects or insufficiency in or accident to or explosion, breakage, derangement or failure of any refrigeration plants or parts thereof or any material. This contract, and all bills of lading issued pursuant to it, shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an in-

crease of any of its responsibilities or liabilities under said Act. If any terms of bills of lading to be issued should be repugnant to said Act to any extent, such terms shall be void to that extent, but no further.

.

14. *If any provision or term hereof be invalid or unenforceable for any reason, GRANCOLOMBIANA shall have the right to terminate this contract by giving seven (7) days' written notice of termination to lessee, but in such event lessee shall not be responsible to GRANCOLOMBIANA except for any hire or other expenses which it may have incurred to the date of termination. Should GRANCOLOMBIANA thereafter determine to carry bananas under freighting agreements similar to this, except for the invalid or unenforceable provision or term, then lessee shall have an option to enter into a new agreement with GRANCOLOMBIANA similar in all respects and terms as herein set forth except for the invalid or unenforceable provision or term; and GRANCOLOMBIANA shall advise lessee of its intention to carry bananas again under freighting agreements and within fifteen days thereafter lessee shall advise GRANCOLOMBIANA whether it intends to exercise the option herein given to it to enter into a new freighting agreement. The term of said new freighting agreement shall be the period constituting the unfulfilled portion of the term of this agreement.*

15. In addition to and without limiting any other rights or immunities provided for herein, no liability shall attach to GRANCOLOMBIANA if any of the terms of this agreement cannot be performed due to Act of God, War, Government, Fire, Strikes, Congestion of Ports, Explosion, or Civil Commotion, and any other cause beyond the control of GRANCOLOMBIANA affecting its performance hereunder. Likewise, no liability shall attach to lessee if any of the terms of this agreement cannot be performed by lessee due to Act of God, War, Government, Strikes, and Civil Commotions, affecting his performance hereunder.

16. This contract shall not be assigned to others by lessee, in whole or in part, nor shall it be assignable by the operation of any judicial procedure without the previous written consent of GRANCOLOMBIANA which consent shall not be unreasonably withheld.

However, GRANCOLOMBIANA agrees to grant lessee the privilege to assign this contract to a new corporation which he is now causing to be organized under the laws of the Republic of Ecuador, S. A. within 75 days from the date of execution of this agreement, subject to approval of GRANCOLOMBIANA, which shall be reasonably given, of the financial standing of said new corporation and the commercial references of its stockholders; and provided that the assignment of this contract by lessee to said new Ecuadorian corporation shall include an assignment of the two (2) letters of credit herein referred to in Clauses No. 17 and 24 of this agreement to said new corporation, to be released as hereinafter provided.

Said Ecuadorian corporation shall, at the time of execution of such assignment, execute an agreement with GRANCOLOMBIANA assuming all obligations, covenants, liabilities, etc., of lessee hereunder, which assumption shall include and be accompanied by letters of credit opened and maintained, by said Ecuadorian corporation as specified in Clauses No. 17 and 24 of this agreement, in substitution for the letters of credit then outstanding, provided that GRANCOLOMBIANA shall simultaneously with the opening of the letters of credit by said Ecuadorian corporation, release the letters of credit caused to be opened by Leonard Morey and Samuel G. Staff under Clauses No. 17 and 24 of this agreement, and thereafter said Ecuadorian corporation shall be the lessee hereunder and Leonard Morey and Samuel G. Staff shall have no further obligations hereunder.

17. To secure the prompt and complete performance by lessee of all the covenants and conditions contained in this

agreement and the payment of damages, costs, expenses and freight and hire which by virtue of the foregoing contract might become due to GRANCOLOMBIANA, from lessee, the lessee agrees that on the date of the execution of this agreement he will cause to be opened an irrevocable letter of credit with a New York bank and confirmed by and payable by a New York bank in favor of GRANCOLOMBIANA, in the amount of \$45,000.00 U.S. Currency. It is agreed that the said letter of credit shall always be maintained until August 15, 1957 in the sum of \$45,000.00 U.S. Currency regardless of payments made against it and that said letter of credit shall not be cancelled so long as any claim of GRANCOLOMBIANA against the lessee arising out of this agreement is not settled or discharged in full. The lessee agrees that within ten (10) days after any withdrawal from the said letter of credit below \$45,000.00 he shall cause the same to be increased so that it shall always be maintained in the sum of \$45,000.00 except for the ten (10) day period necessary to bring it to that amount; and should lessee fail so to maintain the said letter of credit in the sum of \$45,000.00, then the failure shall be deemed a breach of the within contract. Said letter of credit shall state that GRANCOLOMBIANA or its agent, TRANSPORTADORA GRANCOLOMBIANA LTDA., shall be able to draw on the New York bank upon presentation of

(a) Invoice of TRANSPORTADORA GRANCOLOMBIANA, LTDA. for charges hereunder in quadruplicate; and sworn statement of TRANSPORTADORA GRANCOLOMBIANA, LTDA. that lessee is obligated to its principal in the amount stated in the invoice above referred to with respect to the item or items specified in said invoice; or

(b) Invoice of TRANSPORTADORA GRANCOLOMBIANA, LTDA. in quadruplicate and original bills of lading.

18. This contract shall commence on July 20, 1955 and remain in full force and effect until July 19, 1957. In the event that lessee shall fail to make any of the payments

called for under this contract when the same shall become due and payable or shall breach any of the terms hereof in addition to and not in substitution for any of its other rights hereunder, GRANCOLOMBIANA may, by seven days' written notice to lessee, terminate this contract in its entirety and in such event shall have recourse to damages as hereinafter set forth in Clause 24.

19. At the expiration of this contract, lessee shall have the option to renew this contract for *three* (3) additional years on terms and conditions, including hire, which, in the aggregate, shall be no less favorable to GRANCOLOMBIANA than those contained in any bona fide written offer made to GRANCOLOMBIANA by any other prospective lessee for such years. GRANCOLOMBIANA, not more than 120 nor less than 90 days prior to the expiration of this contract, shall advise lessee, in writing by registered mail, of the terms of such other offer. In the absence of such advice, lessee's option shall be to renew on the same terms and conditions as herein contained. Within thirty (30) days of receipt of such advice or at least sixty (60) days before the expiration of this contract if no such advice is received by lessee, lessee will advise, in writing by registered mail, GRANCOLOMBIANA as to whether the option is exercised.

20. Lessee will have the option to hire additional refrigerated space in any additional vessel or vessels, other than the vessels expressly mentioned in this contract, that GRANCOLOMBIANA may operate for its own account from Ecuadorian ports to New York, New York, provided lessee meets the terms and conditions (including hire) that GRANCOLOMBIANA will offer to lessee, for each particular vessel. GRANCOLOMBIANA, shall advise lessee in writing by registered mail, of the terms of such offer for each vessel. If within the ten (10) days following the submission by GRANCOLOMBIANA of such offer to lessee, lessee has not accepted the terms and conditions submitted to him by GRANCOLOMBIANA, GRANCOLOMBIANA shall be free to lease, such additional space to others, for any purpose, including the

transportation of bananas. Should GRANCOLOMBIANA from time to time, desire to substitute a vessel in place of any one of the five (5) vessels named herein, GRANCOLOMBIANA shall have the right to do so provided that lessee shall obtain approximately the same space on such substituted vessel as lessee had on the vessel to be removed from the northbound run and provided, further, that the rate for hire for such space on such substituted vessel shall be reasonably in proportion to the rate of hire paid by lessee for the space on the vessel to be removed from the northbound run, taking into consideration the characteristics of the substituted vessel.

21. Notwithstanding the provisions set forth herein relative to lessee's shipments to Philadelphia, Pa., it is further understood and agreed that lessee shall have the option to carry on unloading operations in accordance with the terms of this contract at any of the following ports: Jacksonville, Florida, Charleston, South Carolina, Savannah, Georgia, Norfolk, Virginia or Baltimore, Maryland, provided lessee notifies GRANCOLOMBIANA as to the name of the port where the cargo will be unloaded upon completion of the loading operations.

In the event that after the vessel has sailed from the loading port, lessee desires to unload at any of above mentioned ports and so notifies GRANCOLOMBIANA, GRANCOLOMBIANA in its sole discretion, may order the vessel to proceed to such port and lessee will pay GRANCOLOMBIANA \$2,000.00 U.S. Currency for the deviation of the vessel plus the inward and outward port charges incurred by the vessel in the fulfillment of such call and all expenses incurred in unloading said cargo plus wharfage shall be for lessee's account.

Should GRANCOLOMBIANA, in its sole discretion, decide that such call cannot be performed by the subject vessel, GRANCOLOMBIANA will notify lessee accordingly and no liability whatsoever will attach to GRANCOLOMBIANA for its

refusal to deviate. In such event lessee shall be obligated to perform unloading operations at Philadelphia. Lessee shall have the option to carry on unloading operations in accordance with the terms of this contract at New York, New York provided that it gives GRANCOLOMBIANA notice to that effect at least two (2) days prior to the expected time of arrival at the port of Philadelphia, Pa. and in such event there shall be no deviation charges incurred by lessee for unloading at New York, New York in lieu of Philadelphia, Pa., it being understood and agreed however that such unloading at New York shall be at lessee's sole risk and expense and shall constitute a waiver of all responsibility on the part of GRANCOLOMBIANA which shall have the right to continue its scheduled calls of the vessels at Philadelphia, Pa. and Baltimore, Md. prior to their arrival at New York, New York.

• • • • •

24. In addition to the irrevocable letter of credit which lessee will cause to be opened and maintained in the amount of \$45,000.00 U. S. currency in favor of GRANCOLOMBIANA as hereinabove set forth in Clause No. 17, lessee will cause to be opened and maintained another irrevocable letter of credit with a New York bank and confirmed by, and payable by a New York bank in favor of GRANCOLOMBIANA in the amount of \$50,000.00 U. S. currency. Said letter of credit shall continue in full force and effect until August 15, 1957. Said letter of credit will be opened for one (1) year; and ten (10) days prior to the expiration thereof, lessee shall cause to be opened a new letter of credit for \$50,000.00 for a further period of one (1) year in favor of GRANCOLOMBIANA as herein provided to take effect upon release by GRANCOLOMBIANA of the expiring letter of credit; and ten (10) days prior to the expiration of said second letter of credit lessee shall again cause to be opened a new and third letter of credit as herein provided to expire on August 15, 1957 and to take effect upon release by GRANCOLOMBIANA of the expiring second letter of credit.

Failure to open and deliver to GRANCOLOMBIANA a second, and a third, letter of credit, as herein provided, ten (10) days prior to the expiration of the then expiring letter of credit shall constitute a breach of this agreement by lessee, provided such failure shall not have been caused by the failure of GRANCOLOMBIANA to release the expiring letter of credit.

The lessee agrees that in the event he shall either breach this contract or terminate the same without cause prior to the expiration date hereof, GRANCOLOMBIANA shall have the right to draw against said letter of credit by simple draft in the sum of \$50,000.00 as agreed liquidated damages and not as a penalty for such breach or unlawful termination; and to the extent that there may be a balance remaining in the aforesaid letter of credit referred to in Clause No. 17, then GRANCOLOMBIANA shall be entitled to draw on the same to the extent of \$30,000.00 thereof, and no more, as additional agreed liquidated damages and not as a penalty for lessee's breach or unlawful termination of this contract. Upon payment to GRANCOLOMBIANA of the aggregate of \$80,000.00 covered by both said letters of credit, and no more, in the event of breach or unlawful termination by lessee, there shall be no further liability on the part of lessee to GRANCOLOMBIANA by reason of a breach of this contract or an unlawful termination thereof and any excess remaining in the aforesaid letters of credit shall be released to lessee.

* * * * *

Exhibit 16

THIS AGREEMENT made and entered into this 22nd day of May, 1957, by and between FLOTA MERCANTE GRANCOLOMBIANA S. A., a Colombian corporation, with its principal place of business in the City of Bogota, Republic of Colombia, South America, hereinafter called "GRANCOLOMBIANA", acting through its duly authorized agent, the North American Division of TRANSPORTADORA GRANCOLOM-

BIANA LTDA., a Colombian Limited Liability Corporation, authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and PANAMA ECUADOR SHIPPING CORPORATION, a Panamanian corporation with its principal place of business in the City of Panama, Republic of Panama, hereinafter called "lessee"

WITNESSETH

WHEREAS, Grancolombiana entered into a contract on July 20, 1955 with Leonard Morey and Samuel G. Staff, which contract was subsequently assigned to the Lessee; and

WHEREAS, the said contract provides that it would terminate on July 19, 1957 unless the Lessee exercised its option, pursuant to Clause 19 of said contract to renew the contract for three (3) additional years, commencing July 20, 1957; and

WHEREAS, the Lessee has advised Grancolombiana, in writing that it desires to exercise its option and renew said contract for three (3) additional years; and

WHEREAS, Grancolombiana is agreeable to extending the said contract for three (3) additional years.

NOW, THEREFORE, IT IS MUTUALLY AGREED, as follows:

1. That the term of the contract heretofore entered into by Grancolombiana and the Lessee, is hereby extended from July 20, 1957 to July 19, 1960.

2. Clause 5, Sub-divisions (a) and (b) of said contract shall be deemed amended to read as follows:

- (a) During thirty-nine (39) weeks of each calendar year, the following specific rates which represent the full hire for the total refrigerated space of No. 3 hold of each vessel on each northbound voyage:

SHIP	1st year	2nd year	3rd year (subject to increase as hereinafter provided)
CD. DE MANIZALES	\$ 7,700.00	\$ 8,050.00	\$ 8,050.00
CD. DE QUITO	11,000.00	11,500.00	11,500.00
CD. DE MEDELLIN	14,300.00	14,950.00	14,950.00
CD. DE IBAGUE	15,950.00	16,675.00	16,675.00
CD. DE CALI	15,950.00	16,675.00	16,675.00

which Lessee will pay for each northbound voyage of the subject vessels regardless of the quantity of bananas shipped and regardless of whether or not any shipment is in fact made, except for such causes as are herein specified in sub-paragraph (g) of this clause. Lessee has the option at any time to carry other produce subject to written approval of Grancolombiana which shall not be unreasonably withheld.

(b) During 13 weeks of each Calendar Year, to be specified by the Lessee, the Lessee will be responsible, only, for the payment of a minimum hire for each vessel, as follows:

SHIP	1st year	2nd year	3rd year (subject to increase as hereinafter provided)
CD. DE MANIZALES	\$ 4,400.00	\$ 4,600.00	\$ 4,600.00
CD. DE QUITO	7,370.00	7,705.00	7,705.00
CD. DE MEDELLIN	8,800.00	9,200.00	9,200.00
CD. DE IBAGUE	10,230.00	10,695.00	10,695.00
CD. DE CALI	10,230.00	10,695.00	10,695.00

through the payment of which the Lessee is entitled to ship up to the following amount of banana stems in each vessel:

CIUDAD DE MANIZALES	4,000 stems
CIUDAD DE QUITO	6,700 stems
CIUDAD DE MEDELLIN	8,000 stems
CIUDAD DE IBAGUE	9,300 stems
CIUDAD DE CALI	9,300 stems

Lessee will pay for each northbound voyage of the subject vessels during these thirteen weeks the minimum hire specified above regardless of Lessee's ability to ship in each vessel the number of stems to which Lessee is entitled and regardless of whether or not any shipment is in fact made, except for such causes as are hereinafter specified in subparagraph (g) of this clause.

Lessee will have the privilege to ship, during said 13 weeks, any additional amount of banana stems, that the vessels can take, over and above the limit to which Lessee is entitled as aforementioned, and Lessee will pay Grancolombiana at the rate of One Dollar and twenty-five cents (\$1.25) per each additional stem thus shipped during the term of this contract, subject however to any increase in rate during the third year of this contract as hereinafter provided, but in no case will Lessee be obligated to pay, in the aggregate, regardless of the additional amount of stems loaded in each vessel, a higher freight than those specified in above sub-paragraph (a) of this clause for the full refrigerated capacity of each subject vessel.

It is hereby agreed between the parties that in the event the cost of operation of Grancolombiana's vessels shall increase during the third year of this contract, such increased cost shall include but not be limited to increases in the cost of overhead, insurance, repairs, food, taxes, supplies, port charges, stevedores, tugs, fuel oil, crew wages, etc., Grancolombiana shall have the right, in its sole and

absolute discretion, to increase the minimum price hereinabove set forth for the carriage of bananas during the third year of this contract in an amount commensurate with such increased costs and the Lessee agrees that it shall accept and be bound by any such increases which Grancolombiana may make for the carriage of bananas during the said third year period of this contract.

3. Clauses 17 and 24 of said contract shall be deemed amended and modified only to the extent that the letters of credit referred to therein shall be maintained until August 15, 1960.

* * * * *

7. All of the remaining terms and conditions of the contract entered into between Grancolombiana and the Lessee's assignor on the 2nd day of July, 1955, shall remain in full force and effect as if this agreement had not been entered into and all rights and obligations under said agreement of July 2, 1955 are expressly assumed by this Lessee.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

* * * * *

Exhibit 17

July 11, 1958

Panama Ecuador Shipping Corp.
22 E. 4 Street
New York, N. Y.

Gentlemen:

We refer to agreement dated July 20, 1955 which was subsequently assigned to you by Messrs. Morey and Staff and to agreement entered into with your good selves on May 22, 1957 extending the term of the original agreement to July 19, 1960 and modifying the said original agreement in various respects.

We have noted your requests for certain changes to be made therein and we are pleased to advise you that we

are prepared to change the said agreement, as extended, in the following respects:

1—The vessels that will be engaged on July 1st and thereafter in this trade will be the “Ciudad de Tunja”, “Manuel Mejia”, “Cartagena de Indias”, “Ciudad de Barranquilla”, “Ciudad de Pasto” and “Ciudad de Guayaquil” or “Ciudad de Ibague” in substitution for the ones designated in Clause No. 1 of the original agreement, without prejudice to Grancolombiana’s right as established in Clause No. 3 of the original agreement, as extended regarding control and disposition of schedules, sailings, arrivals, as well as replacement, cancellation and/or substitution of vessels as hereinafter established.

2—Clause 5, Sub-divisions (a) and (b) of the original agreement, as modified by paragraph 2 of the extension agreement dated May 22, 1957, shall be deemed amended to read as follows:

(a) The basic rates of hire for the refrigerated space of each of the above mentioned vessels is \$14,500.00 for the use of the entire refrigerated capacity of number 3 hold; however it has been mutually agreed that during the year commencing July 1st, 1958 and ending June 30, 1959 Lessee will pay Grancolombiana for the use of the refrigerated capacity of the subject vessels, free in and out of said vessels as follows:

(b) During thirty-nine (39) weeks of above mentioned year to be specified by the Lessee, the Lessee shall be responsible, only, for the payment of a minimum hire of \$14,000.00 for each northbound voyage of each vessel through the payment of which the Lessee is entitled to ship up to 14,000 stems of bananas per voyage.

(c) During ten (10) weeks of above mentioned year to be specified by the Lessee, the Lessee shall be responsible, only, for the payment of a minimum hire of \$9,300.00 for each vessel through the payment of which the Lessee is entitled to ship up to 9,300 stems of bananas per voyage.

(d) During three (3) weeks of above mentioned year to be specified by the Lessee, the Lessee shall be responsible, only, for the payment of a minimum hire of \$7,250.00 for each vessel through the payment of which the Lessee is entitled to ship up 7,250 stems of bananas per voyage.

(e) Lessee will pay for each northbound voyage of the subject vessels, during these fifty-two (52) weeks, the minimum hire specified above regardless of the quantity of bananas shipped and regardless of whether or not any shipment is in fact made, except for such causes as are herein specified in sub-paragraph (g) of Clause 5 of the original agreement.

(f) Lessee shall have the privilege to ship, during said fifty-two weeks (52) any additional amounts of banana stems that the vessels can take, over and above the limit to which Lessee is entitled as aforementioned, and Lessee will pay Grancolombiana at the rate of \$1.00 for each additional stem thus shipped, it being understood however that Lessee shall not be required to pay hire in excess of \$15,000.00 per voyage regardless of the amount of banana stems shipped over and above 15,000 stems per voyage.

3—Clause 5, Sub-division (d) of the contract dated July 20, 1955, as extended by agreement dated May 22, 1957, shall be deemed amended to read as follows:

The Lessee shall have the option to load bananas at Guayaquil or Puerto Bolivar without incurring any surcharge however, it is expressly understood that Grancolombiana, at its sole discretion, shall have the right to tender the vessels for loading at the port of Puna in place and stead of Guayaquil and in the event any vessel is tendered by Grancolombiana under agreements dated July 20, 1955, May 22, 1957 and this agreement, at any port, the Lessee shall remain liable for hire regardless of whether or not any bananas are shipped by the Lessee except for such causes as are specified in Clause 5, Sub-division (g) of the original agreement.

4—Paragraph 3 of agreement dated July 20, 1955, as extended by agreement dated May 22, 1957, is hereby amended to read as follows:

The schedule of sailings of the afore-said vessels or any of them, shall, at all times, be subject to the complete disposition and control of Grancolombiana as to all circumstances connected with said sailings, including but without any limitation, the time, date and hour, and place of departure, the various ports of call, and the time, date and hours, and place of arrival, as well as replacement, cancellation and/or substitution of vessels; however, Grancolombiana agrees to expedite the sailing of the subject vessels from Guayaquil, Puerto Bolivar or Puna upon completion of the loading of bananas and to run them in their north-bound voyages, from Guayaquil, Puerto Bolivar or Puna to Philadelphia, reserving its right to call at any intermediate South American ports, for a total period of time not exceeding sixty (60) hours. It is estimated that within normal conditions these vessels will make this run between Guayaquil, Puerto Bolivar or Puna and Philadelphia in a maximum of twelve (12) days, it being understood that Grancolombiana will use its best effort to have the vessels, whenever possible, arrive at Philadelphia between Mondays and Fridays of each week; should any vessel herein named make this run, within normal conditions, in more than twelve (12) days, counting said period from the date and hour of its departure from its port of loading bananas under this agreement, then Grancolombiana shall pay Lessee for each hour or fraction thereof beyond said period of twelve (12) days at the rate of U. S. \$100.00 per hour or fraction thereof.

5—The terms of this agreement only insofar as they modify the original agreement dated July 20, 1955 as extended by agreement dated May 22, 1957, shall be effective between the period commencing July 1, 1958 and ending June 30, 1959.

All of the remaining terms and conditions of the contract entered into between Grancolombiana and your assignors on July 20, 1955, except as modified by agreement dated May 22, 1957, shall remain in full force and effect as if this agreement had not been entered into and all the rights and obligations under said agreement of July 20, 1955 as modified by extension agreement dated May 22, 1957, are expressly assumed by your goodselves.

If you are in agreement to these terms and conditions, kindly signify your acceptance by signing the original of this letter and returning same to us.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

By: TRANSPORTADORA GRANCOLOMBIANA, LTDA.

By:

Accepted:

PANAMA ECUADOR SHIPPING CORP.

Exhibit 18

Translation From Spanish

7735

MINUTES N° 480

March 5th, 1957

.....

NEW CONTRACT FOR TRANSPORTATION BANANAS GUAYAQUIL-PHILADELPHIA—Doctor Diaz continued submitting his report and mentioning the facts relating to the present contract had with the Ecuadorian Fruit for transportation of bananas Guayaquil-Philadelphia, and other pertinent matters concerning its renewal. He made a lengthy report on the various refrigerated capacities of the steamers being used in the New York-Buenaventura-Guayaquil service, mentioning the fact that because they all vary in size, this was rather difficult for the purpose of leasing this space; that the first contract was executed with Mr. Luis Noboa

upon maturity of which there was a continuity solution of approximately two years, because the lessee, Mr. Noboa had cancelled his negotiations with the Standard Fruit.

That, on July 20th., 1955 there was executed a new contract with the Ecuadorian Fruit, represented by Messrs. L. Morey and Samuel G. Staff, which has been fulfilled by both parties satisfactorily, and which will run until July 19th. of the current year.

That, as the Board will recall, the Ecuadorian Fruit was sustaining losses in its business for some time, as the results of which the Board ordered a refund to them of \$1000.00 per shipment and which, because of a decision from the Management, will not be in effect commencing from March 1st. of this year, considering that the abnormal competitive conditions then existing for the contractors have now disappeared, and said contractors are now doing business in a regular manner and obtaining regular or reasonable profits.

That, as the results of the above contract, the "Flota" has collected from Ecuadorian a gross freight total amounting to US\$826,099.00 plus US\$7,474.00 for the rental of the conveyor in unloading operations.

That, as the results of damages to five shipments, the Ecuadorian lodged claims for US\$130,000.00, but that he was able to settle same, as the Board is already aware, for the amount of US\$20,000.00 which is equivalent to a deduction of 2.42% which is a very low percentage in comparison with the usual 15% deduction which applies to this type of transportation.

That, inasmuch as the present contract shall mature in the very near future and, notwithstanding the fact that it includes a 3 years' option on behalf of the lessees, he has had a legal opinion issued as to said extension under the terms of the option for the purpose of avoiding a possible litigation or demand (suit) against "Flota" as

was the case with "Grace", on the basis of American legislation which calls for open bids in these cases or to hear and consider proposals from any other interested shippers. That the legal opinion was rendered by the attorney, Mr. Renato Giallorenzi, of New York, who considers that the option is valid, but advises that, if there are any other bidders, they should be given the terms and conditions of "Flota" and their proposals should be considered.

That, on the strength of the foregoing, Mr. Consolo was given an opportunity to submit his proposal, which he has not done as yet, and it is believed that he will not submit any; but, in any case, "Flota" submitted to him its terms and conditions by means of a letter N° GM-2479 dated at New York on February 26th., 1957. That the Atlantic Fruit Steamship Co., represented by Mr. Consolo has until March 10th. of this year to submit its proposal.

That, the only two proposals already made and which he has brought to the consideration of the Board, are from Mr. Luis A. Noboa N., in a letter dated at Guayaquil on February 20th., last, and from Mr. Samuel G. Staff representing the Ecuadorian Fruit. That he instructed the Cost Department to prepare a comparison chart between the prices proposed by Mr. Noboa and those proposed by Mr. Staff and, from the results obtained, it is evident that in the three years of the fulfillment of the contract there would be a difference amounting to US\$28,772.00 approximately in favor of the proposal from Mr. Staff. That the rates proposed by Mr. Noboa are fixed, with one figure for the 38 weeks of standard market operations and a lower figure for the 14 summer weeks. Mr. Noboa also proposes that "Flota" agree to unload the bananas either in Jacksonville, Charleston, Philadelphia and/or New York which is, to all intents and purposes not advisable, because it would affect the regular schedule of the New York-Guayaquil service. That the principal characteristics of Mr. Staff's proposal include in the rate offered, an increase of

10% above present prices for the first year; an increase of 15%—also on current rates—for the second year, and a minimum increase of 1% (also on present prices or rates) for the third year, which increase for the third year may be higher if justified by increased costs to “Flota”.

That the other terms of the contract in force, such as the letters of credit for non-fulfillment of the contract and for the payment of freight charges, will remain unchanged. That, in closing, he feels that this proposal is preferable by all means, unless the Board has a different opinion, and he favors the proposal submitted by Mr. Staff in representation of the Ecuadorian Fruit.

The Board unanimously agreed with the considerations and opinion of the General Manager, and the President of the Corporation, Mr. David Peralta, stated that he was personally very pleased to see that the advantages shown were in favor of the proposal from Ecuadorian Fruit, because this firm had opened a new market for the Ecuadorian fruit, which is decidedly most convenient to the interests of Ecuador, which facts make the proposal from Ecuadorian Fruit preferable in his personal opinion, even under relatively lower conditions, above any other proposals which do not meet the requirement which he had just mentioned.

.....

MINUTES N° 482
March 13th, 1957

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PROPOSAL BANANAS GUAYAQUIL-PHILADELPHIA—Dr. Diaz read a proposal from the Atlantic Fruit Steam Ship Company, represented by Mr. Philip R. Consolo, whereby they would take the refrigerated rooms for the transportation of bananas in the Guayaquil-Philadelphia service, and which appears in letter dated the 6th. inst. and signed by the above mentioned Mr. Consolo. That, insofar as prices are concerned, the Board can see that this proposal is lower than the one from Mr. Staff for the first year and

"a fortiori" for the second and third years; that, furthermore, Mr. Consolo requested that the selection of the ports of destination be left to the option of the lessee, which is unacceptable because, as he had mentioned in a previous occasion when referring to Mr. Noboa's proposal, such option would be detrimental to the schedule of the Steamship Company.

The Board, thereafter, confirmed the awarding of the contract given to the Ecuadorian Fruit, represented by Mr. Samuel G. Staff.

A TRUE COPY FROM THE ORIGINAL

FLOTA MERCANTE GRANCOLOMBIANA S. A.
(s) Policarpo Gutierrez E.
Secretary General

* * * * *

Exhibit 19

May 13, 1958

Panama Ecuador Shipping Corp.
22 East 4th Street
New York 3, N.Y.

Attention: Mr. Jack Friedlander

Gentlemen:

We have been advised by the General Manager of Flota Mercante Grancolombiana, S.A. that Flota has agreed to grant your request for an additional four weeks extension of the conditions set forth in our letter ACC-06592, dated April 28, 1958 regarding your shipments of bananas from Ecuador under corresponding agreement signed between your company and Flota Mercante Grancolombiana.

These four weeks hereby mentioned will run in direct continuation of the six weeks granted in our above mentioned letter making thus a total of ten weeks to be covered by this emergency condition.

I have been instructed to make it known to you that Flota will not be in position to grant any additional extension once these ten weeks have expired, and that all the terms and conditions of the contract will be then in full force and effect.

You will, no doubt, realize that Flota has responded in a great spirit of cooperation, and has made substantial sacrifice to meet your request. Flota expects that you will be able during the period of this four weeks extension to arrange the necessary to resume normal shipments.

Yours very truly,

TRANSPORTADORA GRANCOLOMBIANA, LTDA.
JOSE J. BORRERO
Acting General Manager
Northamerican Division

JJB:do

cc: Comptroller, N.Y.

Dr. Diaz, Bogota

PANAMA-ECUADOR SHIPPING CORP.

May 6, 1958

Flota Mercante Grancolombiana
79 Pine Street
New York, New York

Gentlemen:

Written notice is hereby given to you pursuant to Paragraph 5, Sub-section (g) of our agreement dated July 20, 1955, and as renewed by agreement dated May 18, 1957 not to load any further bananas for the reason that a blight exists on the plantations in Ecuador and the fruit cut is unmarketable.

You have been previously advised as to the existence of the blight and have all of the material evidencing same.

Until the blight is terminated, there is to be no loading of bananas.

Very truly yours,

PANAMA-ECUADOR SHIPPING CORP.
Jack Friedlander
Treasurer

JF:RRN

cc: Dr. Diaz

J. Borrero

S. D. Zevallos

D. Galton

April 28, 1958

Panama Ecuador Shipping Corp.
527 Lexington Avenue
New York, N.Y.

Gentlemen:

We wish to advise you that on April 21, 1958 the Board of Directors and the General Manager of Flota Mercante Grancolombiana, S.A., agreed, in accordance with your request, to grant you for a period of six weeks only; said period to commence with the sailing of the "MANUEL MEJIA"—Voyage 5—on April 2, 1958, the following changes in your existing contract:

- a) Panama Ecuador Shipping Corp. agrees to load on the ships of the Guayaquil-New York line, on a weekly basis, up to 6,500 stems of bananas and is obligated to pay Flota Mercante Grancolombiana, S.A., as hire, the amount of US \$8,000.00 per ship, within the terms and conditions stipulated in the contract in force.
- b) If Panama Ecuador Shipping Corp. does not load one or more ships, or loads a quantity smaller than 6,500 stems, nevertheless it shall pay Flota Mercante Grancolombiana, S.A., within the terms and conditions stipulated in the contract in force, the amount of US \$8,000.00.

- c) If Panama Ecuador Shipping Corp. should ship a larger quantity of stems of bananas than the 6,500 stems mentioned in point a) of this contract, it shall pay Flota, within the terms and conditions stipulated in the contract in force, in addition to US \$8,000.00 for hire, the amount of US \$1.25 per each stem in excess of 6,500 stems.
- d) If Panama Ecuador Shipping Corp. wishes to load at Puerto Bolivar, then, it is obligated to pay Flota Mercante Grancolombiana, S.A., within the terms and conditions stipulated in the contract in force, in addition to the US \$8,000.00 for the hire of the refrigeration space of each vessel, the amount of US \$350.00 per each vessel, to compensate for the port charges, etc.
- e) The term of this agreement is for six weeks starting with the shipment of bananas on the M/S "MANUEL MEJIA"—Voyage 5—on April 2, 1958 and it cannot be extended for any reason.

It is especially understood and agreed that all of the remaining terms and conditions of said contract continue in full force and effect and without modification.

It is further understood and agreed that at the end of the said period of six weeks to commence on April 2, 1958, the changes in the contract enumerated "A to E" above, will cease and terminate and hire will be paid in accordance with the terms and conditions of said contract. This concession on Flota Mercante Grancolombiana, S.A.'s part

shall not be construed as a waiver, past or present, of any of its right under said contract.

Very truly yours,

TRANSPORTADORA GRANCOLOMBIANA, LTDA.
J. J. Borrero
Acting Manager
North American Division

JJB/aw

The foregoing terms and conditions are accepted and agreed to:

By:

PANAMA-ECUADOR SHIPPING CORP.

May 8, 1958

Panama-Ecuador Shipping Corp.
22 E. 4 Street
New York 3, N.Y.

Attention: Mr. Jack Friedlander

Dear Sir:

We acknowledge receipt of your letter dated May 3, 1958 addressed to our Principal, wherein you advise that the loading of bananas will be suspended in view of a blight which is now existing on the plantations, in Ecuador and accordingly you invoke Paragraph 5, Sub-Section (g) of agreement dated July 2, 1955, which was extended by agreement dated May 16, 1957.

In our opinion you have failed to furnish us with any evidence which would support your invoking the aforementioned paragraph 5, Sub-Section (g) of our agreement and accordingly we reject your notice to suspend loading bananas by you on our vessels under the contract.

Please be advised that Grancolombiana will continue to have its vessels call at the loading ports referred to in said agreement and in the event you fail to load bananas

in accordance therewith, claim will be made upon you for freight which will be collected against your Letter of Credit which we now hold.

Very truly yours,

TRANSPORTADORA GRANCOLOMBIANA, LTDA.

JOSE J. BORRERO,

Acting General Manager,
Northamerican Division

JJB:dp

cc: Dr. Alvaro Diaz, Bogota

Date 11-6-57

Id

ACION

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—La firma ESSENTIAL PRO
DUGGS Co., INC., 90 West
Street, New York 5, N. Y., me
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la Cámara de Comercio ofec-
a los embotelladores de beb-
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Mercado de Valores

NUEVA YORK, 15. — (UPI)

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Seccional del Ecuador

MN "CIUDAD DE PASTO"

Arriba hoy procedente de Nueva York y zarpa-
rá mañana rumbo al Callao. Estará nuevamente en
este Puerto el 27 del presente y zarpará el 29 con
destino a Nueva York, con escalas en Buenaventu-
ra, Filadelfia y Baltimore.-

Recibe carga directa para dichos Puertos y de
trasbordo.

EMBARQUE "VIA GRANCOLOMBIANA"

CAMIONETA MARIA ELENA

Saló de Guayaquil desde hoy todos los días para Ya-
guachi, Jujan y Babahoyo a las 6 p.m. Estación Parque
Pto. Aconcagua, Caltán v Chimborazo (seccional).

**EN ESTA
CARRERA
DE SUEROS
Y CARROS**

**UD. PUEDE
SER EL
GANADOR**

Para el perfecto funcionamiento
de su auto o camión.

REPUESTOS LEGITIMOS

TAUNUS Ford EDSEL

... economizan tiempo y dinero

Exhibit 25

New York, February 26, 1957

Atlantic Fruit Steamship Company
44-25 North Michigan Avenue
Miami, Florida

Att: Mr. Consolo
Re: Refrigerated space vessels
Ecuador/New York bound.

Dear Sir:

In regard to your telephone request we are giving you herewith the refrigerated capacities of the vessels that are at the present time engaged weekly in the transportation of bananas from Guayaquil to the United States as follows:

CIUDAD DE MANIZALES	—27,610 cu. ft.
CIUDAD DE QUITO	—43,120 " "
CIUDAD DE MEDELLIN	—56,020 " "
CIUDAD DE IBAGUE	—62,115 " "
CIUDAD DE CALI	—62,115 " "

We understand that it was your intention to favor our company with a bid for the above refrigerated space for the transportation of bananas from Ecuadorian ports to a United States North Atlantic port, and if this is the case

we advise you to submit such proposal to our Principal Office in Bogota:

Flota Mercante Grancolombiana, S.A.
Apartado Aereo 44-82
Bogota, Colombia
Attention: General Manager,

no later than March 10th.

Yours very truly,

TRANSPORTADORA GRANCOLOMBIANA, LTDA.
JOSE J. BORRERO
Acting Manager

JJB:dp

Source: Files of Mr. Consolo

March 6, 1957

Flota Mercante Grancolombiana, S.A.
Apartado Aereo 44-82
Bogota, Colombia

Dear Sir:

With reference to a letter from your New York office of February 26, 1957, I am making the following proposal on your ships respectively:

CIUDAD DE MANIZALES	27,610 cu. ft. we offer	\$7,000
		per trip

CIUDAD DE QUITO	43,120 cu. ft. we offer	\$10,000
		per trip

CIUDAD DE MEDELLIN	56,020 cu. ft. we offer	\$13,500
		per trip

CIUDAD DE IBAGUE	62,115 cu. ft.}	we offer \$15,000
CIUDAD DE CALI	62,115 cu. ft.}	
		per trip

We understand from your New York office that these ships load at Guayaquil, Ecuador, and come to North Atlantic ports at the discretion of the shipper.

All further details pertaining to a contract will be worked out mutually.

Very truly yours,

PHILIP R. CONSOLO
4425 N. Michigan Ave.,
Miami Beach, Florida

Translation

FLOTA MERCANTE GRANCOLOMBIANA
Bogota Office

Bogota, March 25, 1957
S.G.—06413

Mr. Philip R. Consolo
4425 N. Michigan Ave.
Miami Beach, Florida

Dear Sir:

We acknowledge receipt of your kind communication of the sixth instant in response to our #6M-2479 dated New York, February 26th last and addressed to the Atlantic Fruit Steamship Company marked to your attention. The offers contained in yours of March 6 which we are here answering are being considered together with other proposals by the Board of Directors and by the General Management of the Company.

We express to you our thanks and remain your attentive friends and servants,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Alvaro Diaz S.
General Manager

Translation

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Bogota Office

S.G. 13527

Bogota, June 21, 1957

Mr. Philip R. Consolo
4425 N. Michigan Ave.
Miami Beach, Florida

Re: Rental of Refrigerated Space
on Our Ships

Dear Sir and Friend:

We refer to your kind communication of the 6th of March last in which you made us an offer to lease refrigerated chambers on our ships for the carriage of bananas between Guayaquil and the Atlantic ports of the United States.

In this regard, we must inform you that your proposal, together with others of similar nature presented to us in due time, was duly studied by the Managing Board of the Company in a session held on the 13th of March of this year, and in Minute No. 482, the Board resolved to award the contract to another firm because the prices offered by the concern to whom the contract was awarded are higher and the other terms of its offer more favorable to the carrier.

At the end of the period in which the contract we refer to above remains in force, we will be very pleased to receive another bid from you if you are still interested in this trade.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Policarpo Gutierrez E. /s/

Policarpo Gutierrez E.

Director General of Cargo

4425 No. Michigan Ave.

Miami Beach, Fla.

August 23, 1957

Flota Mercante Grancolombiana, S. A.
Apartado Aereo No. 4482
Bogota, Colombia.

Gentlemen:

I am in receipt of your letter of June 21st and wish to again apply for space on your ships due to a recent ruling from the Maritime Commission on Dockets #771 and #775.

Before issuing any allotment of space on your ships, I wish to be considered for a fair and reasonable amount since I have consistently been asking for space on your ships for the past two years.

We further wish to advise you that unless we are allotted a fair and reasonable amount, we will be forced to file a formal complaint.

Please be kind enough to send me your reply to the above address.

Very truly yours,

Philip R. Consolo

Bogotá, October 7th, 1957

Mr.

PHILIP R. CONSOLO
4425 No. Michigan Ave.
Miami Beach, Fla.

Dear Sir:

We acknowledge receipt of your letter dated August 23th, 1957, and wish to advise you that the available reefer space on our vessels has been committed for the next two years.

Of course, we shall be pleased, at the end of said term, to consider your application for allotment of space on our vessels.

We regret that at the present time we cannot be of service to you.

Very truly yours.,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Policarpo Gutierrez E.
Secretario General.

October 21, 1957

Flota Mercante Grancolombiana, S.A.
(Transportadora Grancolombiana)
52 Wall Street
New York, New York

Gentlemen:

We are the attorneys for Mr. Philip R. Consolo, who, by written communications of March 6 and September 20, 1957, (in addition to several oral requests) applied for refrigerated space on your vessels from Ecuador to United States Atlantic ports, for transportation of bananas. Your reply of June 21, 1957, to Mr. Consolo's communication of March 6, states that you awarded space to other applicants after space had been requested by Mr. Consolo.

Decisions of the Federal Maritime Board hold that the transportation of bananas on liner services such as yours constitutes common carriage and requires fair distribution of space among qualified applicants. On behalf of Mr. Consolo, we request an allotment, for a two-year period, of refrigerated space on each of your vessels equipped for the transportation of bananas from Ecuador to Atlantic ports of the United States. Mr. Consolo's requirements are 40,000 cubic feet on each vessel, subject to adjustment to take account of the size of refrigerated chambers and other relevant considerations.

If this request is not met by November 15, 1957, Mr. Consolo will file a complaint against your company with the Federal Maritime Board, demanding an allotment of

space and damages for unlawful exclusion from your vessels.

Very truly yours,

George F. Galland

Exhibit 45

August 6, 1957

Transportadora Grancolumbiana, Ltd.
52 Wall Street
New York 4, N. Y.

Dear Sir:

A client of my office is most anxious to import bananas from Ecuador to any Atlantic Coast port of the United States, preferably New York or Philadelphia. I should like to request, therefore, that you make available to said client 50,000 cubic feet of refrigerated space weekly on your vessels plying in this trade.

Your company is undoubtedly familiar with the recent decision of the Federal Maritime Board in *Banana Distributors, et al. v. Grace Line* (decided April 30, 1957). This Report of the Federal Maritime Board reaffirms the Board's earlier decision in *Consolo v. Grace Line*, 4 F.M.B. 293 (1953), holding that Grace Line, because of its undisputed method of operation as a common carrier, must also be a common carrier of bananas, and that Grace must, by virtue of the Shipping Act, 1916, as amended, make its banana carrying refrigerated space available to the qualified shipping public on some equitable basis of allotment.

The status of the Grace Line as a common carrier of bananas from Ecuador to the United States is in all essential respects similar to the status of the Grancolumbiana Line. Your company, as I am sure you will recognize, is required by the law of the United States, *viz.* the Shipping Act, 1916, as amended, to be a common carrier of bananas

and to prorate your refrigerated space, suitable for the carriage of bananas, between qualified banana shippers on an equitable and fair basis.

The company which I represent is fully capable of conducting all aspects of a banana importing business. We will be willing to make available to you our financial and bank references and to meet such reasonable financial requirements as you may legally impose. The company will also be willing to enter into a guaranteed forward booking arrangement for a definite amount of refrigerated space weekly within the limits of your obligations as a common carrier.

This company is also most anxious to import approximately 15,000 stems of bananas weekly from Ecuador to the Pacific Coast of the United States. In anticipation of the inauguration of your refrigerated service in that trade, I should like to request that you arrange to make available to my client approximately 60,000 cubic feet of refrigerated space weekly in your service from Ecuador to a convenient port of discharge on the Pacific Coast of the United States.

I would appreciate your prompt reply on this matter and will assure you that my client will be most anxious to supply whatever further information you may desire.

Yours very truly,

Richard W. Kurrus

Exhibit 47

Bogotá, August 21, 1957

Mr. Richard W. Kurrus,
Attorney At Law,
243 Washington Building,
Washington, D. C.

Dear Sir:

We acknowledge receipt of your letter dated August 6th, addressed to our office in New York, in which you inform us that a client of your office is anxious to import bananas from Ecuador and request that we make available to said client a weekly refrigerated space in our vessels plying between Ecuador and New York or Philadelphia.

We wish to advise you that we recently called for bids from shippers that showed interest in connection with this space, and after receiving the various bids we allocated the space under a forward booking arrangement to the successful bidder.

We have taken note of your application for space in our vessels plying between Ecuador and the ports of New York or Philadelphia, and we will be happy to advise you upon termination of the present contract, so that you may favor us with your bid in the event you decide to do so. In the interim, we would appreciate it if you would furnish us with the following information, so that we may become acquainted with the demands of your client:

- a) Number of bananas sought to be shipped.
- b) Frequency of shipment.
- c) Name of plantations from which the bananas will originate.
- d) Names of officers, stockholders and directors of shipping and receiving corporations.

- e) Financial statements of both corporations duly certified by Public Accountants.
- f) Ports for which bananas will be destined.
- g) Generally, any other information required, which you deem necessary.

We want to inform you that our Company, Flota Mercante Grancolombiana, is not considering now the establishment in a near future, of refrigerated service between Ecuador and the ports of the Pacific Coast of the United States.

With nothing else on hands, we remain,

Yours very truly,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
ALVARO DIAZ S.
General Manager

Exhibit 75

THIS AGREEMENT made and entered into this 3rd day of July, 1957, effective June 1, 1957, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation, with its principal place of business in the City of Bogota, Republic of Colombia, South America, hereinafter called "Grancolombiana", acting through its duly authorized agent, the North American Division of Transportadora Grancolombiana Ltda., a Colombian Limited Liability Corporation, authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and GRAND SHIPPING, INC., a Panamanian corporation with its principal place of business in the City of Panama, Republic of Panama, hereinafter called "Lessee"

WITNESSETH

1. GRANCOLOMBIANA agrees to lease to LESSEE the refrigerated space existing at the present in the 'tween deck #3

of its vessels known as "CIUDAD DE NEIVA", registered in Colombia, S.A., "CIUDAD DE CUENCA", registered in Ecuador, S. A., "CIUDAD DE POPAYAN", "CIUDAD DE SANTA MARTA, registered in Colombia, S. A., for the transportation of bananas from Guayaquil to Galveston, Texas, U.S.A., on all northbound trips made by such vessels from said Ecuadorian port, via Buenaventura, Colombia, to gulf ports, U.S.A., and LESSEE hereby hires all such refrigerated space under the terms and conditions hereinafter stipulated.

* * * * *

14. If any provision of term hereof be invalid or unenforceable for any reason, GRANCOLOMBIANA shall have the right to terminate this contract by giving seven (7) days' written notice of termination to LESSEE, but in such event LESSEE shall not be responsible to GRANCOLOMBIANA except for any hire or other expenses which it may have incurred to the date of termination. Should GRANCOLOMBIANA thereafter determine to carry bananas under freighting agreements similar to this, except for the invalid or unenforceable provision or term, then LESSEE shall have an option to enter into a new agreement with GRANCOLOMBIANA similar in all respects and terms as herein set forth except for the invalid or unenforceable provision or term; and GRANCOLOMBIANA shall advise LESSEE of its intention to carry bananas again under freighting agreements and within fifteen (15) days thereafter LESSEE shall advise GRANCOLOMBIANA whether it intends to exercise the option herein given to it to enter into a new freighting agreement. The term of said new freighting agreement shall be the period constituting the unfulfilled portion of the term of this agreement.

15. In addition to and without limiting any other rights or immunities provided for herein, no liability shall attach to GRANCOLOMBIANA if any of the terms of this agreement cannot be performed due to Act of God, War, Government, Fire, Strikes, Congestion of Ports, Explosion, or Civil

Commotion, and any other cause beyond the control of GRANCOLOMBIANA affecting its performance hereunder. Likewise, no liability shall attach to LESSEE if any of the terms of this agreement cannot be performed by LESSEE due to Act of God, War, Government, Strikes, and Civil Com-motions, affecting its performance hereunder.

.

Exhibit 76

June 6, 1957

Transportadora Grancolombiana Ltda.
52 Wall Street
New York, N.Y.

Dear Sirs:

I represent R. Dixon & Co. Inc. of 202 Franklin Street, this city, dealers in produce since 1884, specializing in the handling of bananas for more than twenty five years.

In view of the recent ruling of the Federal Maritime Board with respect to the allocation of space, will you be good enough to regard this letter as an application for refrigerated space on your regular weekly sailings between Ecuador and Philadelphia to the extent of 5000 stems of bananas each week.

Will you be good enough to acknowledge receipt of this letter affirming the allocation of such space and advise me as to how soon it will be available. Should you require any other or additional information, please feel free to call upon me.

Very truly yours,

[Illegible]

Exhibit 80

February 11, 1958

Transportadora Grancolombiana Ltda.
79 Pine Street
New York, N. Y.

Dear Sirs:

On the morning of February 11th I called at the offices of Transportadora Grancolombiana Ltda. and after trying to communicate or see Mr. Juan Borrero, I was again sent from party to party to no avail, which has finally, after these many years, exhausted my patience.

I am compelled to write this letter as I have constantly, during my many visits to New York for the past several years, been desirous of securing refrigerated space on your various steamship services for the carriage of bananas from Ecuador to U. S. Gulf and/or Atlantic ports.

Having failed in my many attempts at personal conferences and consultations with your firm, I herewith advise you that unless I receive a fair allocation of refrigerated space on your vessels for the refrigerated transportation of bananas, I shall take the proper action in an attempt to secure this space according to the Maritime Board's decision handed down in "Banana Distributor's Inc. vs. Grace Line, Inc."

Awaiting your immediate and favorable reply,

Very truly yours,

David H. Schultz

Exhibit 81

February 24, 1958

Mr. David H. Schultz
2025 Westheimer
Houston, Texas

Dear Mr. Schultz:

We acknowledge receipt of your letter dated February 11, 1958. Due to the demands which have been made upon us for refrigerated space by proposed shippers, our attorney felt obligated to apply for a declaratory judgment to the Maritime Board because such demands conflicted with our present contracts.

We enclose herewith copy of petition filed with the Maritime Board.

Very truly yours,

TRANSPORTADORA GRANCOLOMBIANA, LTDA.
JOSE J. BORRERO,
Acting General Manager

ENCLOSURE

Exhibit 85

June 6, 1957

Transportadora Gran Colombiana Ltda.
52 Wall St.
New York, N.Y.

Gentlemen:

We have been established as banana importers for many years. Up to the present time we have received bananas from Ecuador on the Grace Line and on the Chilean Line, and on our own vessels to New Orleans.

We are interested in shipping bananas from Ecuador to an Atlantic port on your vessels, and therefore, request that you give us a schedule of sailings from Ecuador and

also an idea of the amount of space you can allot to us on each vessel.

We are in a position to ship from 10 to 15,000 stems of bananas a week and could begin shipments upon three weeks notice.

Should you require any additional information or references of our firm, we shall be glad to furnish them on request, since we have no doubt they will be entirely satisfactory.

We would appreciate your returning the enclosed copy signed by you in acknowledgment of this request for space.

Very truly yours,

ANDES FRUIT & PRODUCE CORP.

Exhibit 90

November 12, 1957

Mr. Jose J. Borrero
Manager of Operations
Transportadora
Grancolombiana Ltda.
52 Wall Street
New York 5, New York

Dear Mr. Borrero:

It certainly was nice of you to take up your time with me when I was in New York last week. I am aware of how busy you must be.

Confirming our conversation, Suwannee Steamship Company would like to make application for refrigerated space aboard your vessels for the carrying of bananas. We are interested in as much space as is possible and do not wish to limit ourselves in applying for space to any particular United States port.

In the event that it appears that space will become available, I will appreciate very much your contacting me at the earliest so that I may have time to submit any and all information about our company which you and your people may require or desire.

Thanking you for your attention to this matter, I remain,

Yours sincerely,

William D. Lovett
Vice President

Exhibit 91

November 19, 1957.

Suwannee Steamship Company,
1010 East Adams Street,
P. O. Box 4069,
Jacksonville, Florida.

Gentlemen:

In reply to your letter dated November 12, I enclose herewith petition which Grancolombiana filed with the Maritime Board.

Very truly yours,

RCG:LS

enc.

cc Transportadora Grancolombiana Ltda.

Att: Mr. J. J. Borrero

Exhibit 92

November 9, 1957

Transportadora Grancolombiana, Ltda.
52 Wall Street
New York 5, N.Y.

Gentlemen:

This letter is written as a formal request for reefer space weekly from Guayaquil, Ecuador to U.S. Atlantic or Pacific ports for the transportation of bananas.

I am not unknown to your Company. The very first voyage you made from Ecuador to the States carried my bananas under the name of Grayson Shipping Lines, Inc. Subsequently, another of my firms, Banana Sales, Inc., represented Noboa here when he was shipping more or less regularly on your vessels. During 1949 and 1950 you acted as agent for our vessels under arrangements I negotiated between Mr. Jason and Hans Tobeason, Inc., and/or Haytian Commercial & Development Co., of which latter Company I was Vice President and General Manager. During that same period we transported bananas on your ships from Barranquilla, Colombia to New York.

At the time Mr. Enrique Gallardo was negotiating for the space now being utilized under contract by another company, he called me in to draft his proposals to you, and the contract entered into by you and him was largely the result of my terms and conditions. Unfortunately he was unable to handle the financing at that time, or so I have heard, and the operation never proceeded.

Presently I am a shipper and spaceholder for a small amount of fruit on the Grace Line. I ship jointly with Suwannee Steamship Company in the same chamber, as I have known and done business with Mr. W. D. Lovett ever since my days in Florida, back ten years or more ago. Of course, my present arrangements are with Wm Lovett, (Jr.), who visited your office last week. Please understand that this request is made by me alone, and is intended as such, and not in any connection with Suwannee, the Lovetts, or their affiliates.

I know that you are under present commitment for the space requested, but the Maritime Board's decision will apply equally to all Steamship Lines under their jurisdiction. Your due consideration to my request will be appreciated, and I look forward to a favorable reply shortly.

Sincerely yours,

Stanley Grayson

November 15, 1957

Mr. Stanley Grayson
322 West 72nd Street
New York 23, N. Y.

Dear Sir:

In reply to your letter dated November 9, 1927 addressed to Grancolombiana, I enclose herewith petition for declaratory order.

Very truly yours,

RCG:cmp
encl.

Two copies to Transportadora Grancolombiana, Ltd.
Attention: Mr. J. J. Borrero

Before the
FEDERAL MARITIME BOARD

Docket No. 835

In re the Petition of
FLOTA MERCANTE GRANCOLOMBIANA, S. A.

For Issuance of a Declaratory Order.

BRIEF FOR PETITIONER

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

AND

PROPOSED FINDINGS OF FACT AND CONCLUSIONS

* * * * *

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ARGUMENT

POINT I

The uncontroverted evidence leads to the inescapable conclusion that the Board's rulings in *Banana Distributors, Inc. v. Grace Line Inc.* and *Arthur Schwartz v. Grace Line Inc.* are inapplicable and accordingly petitioner is a contract carrier of bananas.

In *Carver on the Carriage of Goods by Sea Act*, Tenth Edition, 1957, the author wrote as follows at page 6:

"It is a question of fact whether a man is a common carrier or not."

It is submitted that the facts presented by the petitioner and the intervener clearly establish by uncontradicted evidence, that the petitioner cannot under any circumstances be considered a common carrier and therefore the Board's ruling in the *Banana Distributors Inc. v. Grace Line Inc.* and *Arthur Schwartz v. Grace Line Inc.* are inapplicable.

The Federal Maritime Board concluded *that on the record presented to it* in the Grace Line Inc. proceedings *supra*, that bananas were susceptible to common carriage on Grace vessels only, but that finding cannot in any manner whatsoever be applied to petitioner on the record in this proceeding.

The Grace Line rulings were decided solely upon the record presented in that case. Since it is a question of fact whether a man is a common carrier or not, it is submitted that the record supports the inevitable conclusion that the petitioner, by reason of the physical makeup of its vessels, cannot carry bananas for more than one shipper.

In the *Express Cases*, 117 U. S. 1, (1886), the Court wrote as follows:

*"The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the express man in charge. As the business to be done is 'express', it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. * * * The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company*

can well allow for the business. *If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them.* The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. *The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.*" (pp. 23-25)

The testimony of Mr. Borrero clearly indicated that the petitioner never held itself out as a common carrier of bananas but its dealings with prospective or actual shippers were always on the basis of a contract entered into after preliminary negotiations had been completed, which contracts provided that the entire refrigerated space was let to but one shipper for a definite period of time.

The contracts entered into by petitioner in this regard were the usual contracts known to all carriers of bananas because the shippers themselves realized that before they could engaged in a successful banana import business it was necessary to obtain a firm commitment from a steamship company that it would carry the shipper's bananas for a certain definite period of time.

Petitioner, in all its contracts, offered to the shippers the facilities which it had available for the carriage of bananas. Unlike the Grace Line vessels, which each have two or three holds specially built for the carriage of bananas, the petitioner's vessels are able to offer but one hold per ship which was not specially built for the carriage of bananas. Insofar as the reefer facilities are concerned, the testimony is clear and uncontradicted,

although rebuttal testimony was promised by counsel for the complainants in other related proceedings, which never materialized, that the refrigerating facilities of the Grace Line vessels are more suitable and more adaptable than those of the petitioner's vessels for the carriage of bananas because the Grace Line ships' reefer space was specially fitted out for the carriage of bananas while the petitioner's reefer space was fitted out for the purpose of carrying not only refrigerated cargo such as bananas, but also cargo which required a much lower temperature.

It is significant to note that the credible testimony of Mr. Friedlander was not impeached nor was it shaken in any manner whatsoever to the effect that the physical characteristics of petitioner's vessels make it impossible to service more than one shipper aboard for the purpose of carrying bananas. Mr. Friedlander, whose testimony was backed by the experience of seeing hundreds of loadings and unloadings of petitioner's vessels and a considerable amount of loadings and unloadings of Grace Line vessels, testified in great detail that even to permit three shippers, each sharing one deck alone aboard the petitioner's vessels, would cause chaos and confusion and so extend the loading or unloading time as to cause great delays in the shipments of bananas, which delays, according to Mr. Borrero, might be so disruptive upon the schedules of the vessels, particularly the southbound service which is much more remunerative to the petitioner, that it might cause the petitioner to abandon the carriage of bananas because of the harmful effect of the delays upon the southbound voyages.

A careful examination of Mr. Friedlander's testimony shows beyond a doubt that the acute problem of loading bananas aboard the petitioner's vessels commences with the very moment a longshoreman starts to walk up the staging from the barge into the side ports of its vessels which are located in the upper 'tween deck and which are so narrow as to permit only one longshoreman en-

tering and leaving the vessel at the same time. The problem of loading the petitioner's vessels increases as the longshoremen commence to walk down the stagings into the lower hold, which stagings Mr. Friedlander testified had to be placed at an acute angle because of the physical makeup of these vessels and the height of the decks, particularly the lower hold.

Certainly these problems are not found in the Grace Line refrigerated holds which, we repeat, were constructed under the guidance of competent banana carriers for the purpose of carrying this commodity.

To further complicate the loading aboard the petitioner's ships, heavy plugs, not found in the Grace Line vessels, must be removed from the square of the hatch before access is gained into the lower 'tween deck or the lower hold. Because of their size and weight they are placed about the upper and lower 'tween deck thus interfering with the movement of cargo by the longshoremen. This substantial difference between the Grace Line ships and the petitioner's vessels is further proof that the problem becomes more and more acute as the loading goes on.

Mr. Friedlander testified that the most critical point in the loading of the petitioner's vessels, came into existence after the wings of the holds had been loaded and the stackers were working towards the square of the hatch and in the square of the hatch itself. The loading at that particular point became practically a two-man operation and while that is so where only one shipper was involved, time would be gained by sending the stackers to the other decks to load cargo in the wings while the lower hold was being completely loaded and thereafter sealed with the plugs.

This insurmountable problem, which is at best alleviated by the single shipper in that he could send his stackers to the other holds to load, could not be coped with successfully by three shippers, two of whom of necessity would

have to await the completion of the loading and closing off with the plugs of the lower hold and one of whom would have to subsequently await the completion of the loading of the lower 'tween deck.

Where you have one shipper aboard, there is no problem of co-mingling his bananas and as stated above, if there was a slow down in stacking stems when the stowage reached the square of the hatch, a goodly portion of the stackers could be used to advantage in the other decks because they would be continuously stowing bananas belonging to the same shipper.

The shippers on the Grace Line vessels are not faced with this problem because of the absence of not only the lower hold but in addition thereto, there are two side ports serving each hold, or four in all on the cargo ships and six on the passenger vessels, as distinguished from only two side ports which serve the number 3 hold of petitioner's vessels.

Mr. Friedlander persuasively testified to allow a multiplicity of shippers to use the refrigerated facilities of the petitioner's vessels and if these shippers numbered three, using the same staging and cooperating to the utmost, they would cause delays of between seven to twelve hours in loading and considerable delays would be encountered in unloading in Philadelphia. The delays in loading can only be accounted for by the fact that the physical makeup of the number 3 hold of petitioner's vessels is such that three shippers cannot load as expeditiously as one while on the other hand shippers on the Grace Line vessels can load bananas within the twelve hours afforded to them by the Grace Line.

Under no circumstances, according to Mr. Friedlander's uncontradicted testimony, could the shippers load within the permissible time allowed by petitioner, namely sixteen hours. Such delays in loading would undoubtedly cause the fruit to mature sooner with the consequence that the

outturn of the cargo would constitute a greater percentage of ripens, which, as testified to by various witnesses, command a lower price than the better quality bananas.

The purported attempt to contradict Mr. Friedlander's testimony by Mr. Consolo, who changed his answers as to what the delay would amount to with a multiplicity of shippers aboard and the testimony of Mr. Adir in this regard, should be utterly disregarded and given no weight. While they both admitted, reluctantly, that there would be some delay, their testimony was not based on any experience in loading and/or unloading petitioner's vessels but was merely the product of guesswork on their part. Certainly this speculative testimony should not be given any consideration in the light of Mr. Friedlander's testimony based on his experience with petitioner's vessels and which involved over 160 voyages. The credible testimony of Mr. Friedlander is backed by the knowledge derived from his experience in loading and unloading petitioner's vessels and not on hearsay or a quick visit to petitioner's vessels.

In *Grace Bros. Inc. v. Commissioner of Internal Revenue* (CCA 9th 1949) 173 F. 2d 170, the Court in this connection wrote as follows at page 174:

"It is axiomatic that uncontradicted testimony must be followed."

The petitioner and intervener both have suggested that the Examiner and the Public Counsel go to Ecuador and Philadelphia and attend the loading and unloading of any one of petitioner's vessels, because, in the opinion of the petitioner, it would confirm beyond a doubt the testimony of Mr. Friedlander.

Mr. Consolo and Banana Distributors Inc. both failed to introduce proof to sustain their contention that they were in competition with the intervener. The cases are decisive that shippers alleging undue discrimination under

the Shipping Act must establish by clear proof that there has been "unequal treatment between competing shippers".

See *The Huber Manufacturing Company v. N. V. Stoomvaart Maatschappij "Nederland" et al.*, 4 F. M. B. 343, 347 (1953).

The cases apply the same proof requirement in respect of an allegation of preference, prejudice or advantage under Section 16, First.

The rule is equally applicable to a complaint of unjust discrimination under Section 14, Fourth. *Roberto Hernandez, Inc. v. Arnold Bernstein S, M. B. H. et al.*, 1 U. S. M. C. 686, 691 (1937). Denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors.

Under these rules, long established and firmly held by the successive maritime regulatory bodies, the prospective shippers here fail at the threshold. Not only does their testimony fail to show that they compete with Panama Ecuador Shipping Corporation, the shipper to whom petitioner contracts its space, but shows to the contrary. Thus Consolo's witness, Mr. Meyers, president of R. Dixon & Company, testified distinctly that he is not in competition with Panama Ecuador Shipping Corporation and that Dixon sells bananas to its own customers who have no relationship with and are unknown to Consolo.

While the complaint of Banana Distributors Inc. (Docket No. 841), unlike that of Consolo (Docket No. 827), alleges that Panama Ecuador Shipping Corporation is a competitor of Banana Distributors Inc. "in the trade", the witness, Adir, was unable to support this allegation by more than a repetition of this general assertion, saying that Banana Distributors Inc. was in competition with all other importers of bananas, including Panama Ecuador Shipping Corporation. Mr. Adir nevertheless acknowledged that his firm obtained better prices for its bananas

than Panama Ecuador Shipping Corporation and that the dominant competitive forces in the banana market are United Fruit Company and Standard Fruit Company.

Mr. Friedlander testified that his company's chief competitors are unquestionably the two giants in the banana field; its prices are made to compete against them rather than against the small independent importers like itself.

It is submitted that upon all of the oral and documentary proof introduced at the hearings, the credible evidence proves beyond a doubt that the Petitioner's vessels are so different and apart from the Grace Line vessels that the rulings in those proceedings are inapplicable. It must be concluded that petitioner, in the light of the proof adduced after a full hearing, cannot, under any circumstances, be considered a common carrier of bananas but can only be considered a contract carrier for one shipper of this commodity and accordingly the contracts entered into by the petitioner with Panama Ecuador Shipping Corporation, successors to Morey and Staff, (Exs. 15 and 16) and Grand Shipping Inc. (Ex. 75), are valid and do not violate Section 16, First or Section 14, Fourth of the Shipping Act, 1916.

CONCLUSION

A declaratory order should be entered, upholding the validity of the present contracts of the petitioner.

Respectfully submitted,

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[Certificate of Service dated January 13, 1959]

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of January, 1959, served the foregoing Petitioner's Brief and Proposed Findings of Fact and Conclusions upon all parties of record by mailing a copy thereof, postage prepaid, to counsel for each such party.

RENATO C. GIALLORENZI.

REQUEST FOR ORAL ARGUMENT, EXCEPTIONS
AND
BRIEF OF FLOTA MERCANTE GRANCOLOMBIANA,
S.A.

Flota's Exceptions to Recommended Decision

1—Flota excepts to the Examiner's recommendation that the Board find that it is a common carrier of bananas.

2—Flota excepts to the Examiner's recommendation that the Board find it violated Section 14 Fourth and 16 First of the Act, by discriminating against the complainants.

4—Flota contends that the decision recommended by the Examiner is in error, is not supported by and is contrary to the evidence of record and is erroneous as a matter of law; and further contends that such recommended decision is based upon preliminary findings and conclusions which in some instances do not support and are contrary to the recommended decision and which in other instances are not supported by and are contrary to the evidence of record and the governing law.

5—Flota excepts to the finding that it violated Sections 14 Fourth and 16 First of the Act on the further ground that such a finding was without the scope of the proceedings.

POINT II

Flota's argument as to the second exception.

It was error for the Examiner to find that Grancolombiana has discriminated against the complainants in Dockets 827 and 841 by contracting its space to Panama Ecuador Shipping Corporation without first finding an existing and effectual and actually competitive relationship between the complainants and the allegedly preferred shipper, and, since there is no evidence which would justify such a finding and much evidence which would support a finding to the contrary, it was error for the Examiner to find that Grancolombiana has thereby violated Sections 14 Fourth and 16 First of the Act.

The cases are decisive that a complainant alleging unjust discrimination under the Shipping Act must establish by clear proof that there has been "unequal treatment between competing shippers." *Huber v. Nederland*, 4 F. M. B. 343, 347 (1953); *Afghan-Amer. Trading Co. v. Isbrandtsen*, 3 F. M. B. 622 (1951); *United Nations v. Hellenic Lines*, 3 F. M. B. 781 (1952); *New York v. A. B. Svenska*, 4 F. M. B. 202, 205 (1953); *Kramer v. Inland Waterways*, 1 U. S. M. C. 630, 633 (1937); *Traffic Bureau v. Export*, 1 U. S. S. B. B. 538, 541 (1936). These cases apply the same proof requirement in respect of an allegation of preference, prejudice or advantage under §16 First. The rule is equally applicable to a complaint of unjust discrimination under §14 Fourth. *Hernandez v. Bernstein*, 1 U. S. M. C. 686, 691 (1937). Denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors.

Thus in the case of *Traffic Bureau v. Export*, supra, the Secretary of Commerce stated at page 541:

"It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must

be a definite showing that a difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainant. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, *and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper localities, or commodities.* Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage." (Emphasis added)

In *Kramer v. Inland Waterways Corp.*, supra, the United States Maritime Commission, citing *Traffic Bureau v. Export*, supra, stated at page 633:

"It is well settled that the existence of unlawful preference and prejudice is a question of fact to be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the preference and prejudice complained of is undue and unreasonable in that it actually operates to the real disadvantage of the complainant. To do this *it is of primary importance that there be disclosed an existing and effective competitive relation between the prejudiced and preferred shipper.*" (Emphasis added)

Similarly the Federal Maritime Board in *New York v. A. B. Svenska*, supra, stated the rule as follows at page 205:

"In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) *that the preferred port, cargo, or shipper is actually competitive with complainant*, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust." (Emphasis added)

In *Hernandez v. Bernstein*, supra, where the denial of space was charged as a violation of §14 Fourth of the

Act, the United States Maritime Commission expressly noted at page 690 the fact that the complainant Hernandez, was shipping automobiles to Spain "in competition with such [preferred] distributor".

Under these rules, long established and firmly held by the succession of maritime regulatory bodies, complainants here fail at the threshold. Not only does their testimony fail to show that they compete with Panama Ecuador Shipping Corporation, the shipper to whom Flota contracts its space, but it shows the contrary.

Consolo wisely refrained from directly claiming that he was in competition with Panama Ecuador Shipping Corporation. But he saw the need to show a competitive relationship with Panama Ecuador Shipping Corporation in order to sustain his claim of discrimination and prejudice. In a tangential way, he implanted the suggestion (in lieu of the assertion) casually and in the course of testifying about a collateral point (Tr. 229):

"Q. Do you consider yourself competitively disadvantaged by reason of the fact that you only have one arrival a week as compared with United Fruit, Standard Fruit and even as compared with Panama Ecuador Shipping Company?

* * * *

"The Witness: From my point of view, I think I am at some disadvantage by not having two arrivals a week where other companies in a competitive field have two arrivals or more per week."

But Consolo's own witness, Meyer, president of R. Dixon & Co. which distributes the bananas imported by Consolo, testified to the contrary. He stated explicitly that Consolo's importations do not compete with Panama Ecuador Shipping Corporation's importations on Flota's vessels (Tr. 702):

"Q. What effect, if any, has the importation of the Grancolombiana vessels have on the banana market

from 1955 on? A. Well, in view of the fact they don't compete with me, I wouldn't know."

Indeed, R. Dixon & Co. distributes the bananas imported by Consolo, his brother, Lovett, Joselow, and part of these imported by Noboa (Tr. 662-3, 684-5, 689). Meyer testified that the jobbers to whom he distributes bananas are his own clientele and not the clientele of the various importers for whom he distributes (Tr. 689), and that the jobbers who constitute his clientele do not even know which importer's bananas he is selling them (Tr. 689). If it is possible for competition to exist between Consolo and Panama Ecuador Shipping Corporation at any point in the marketing of the bananas they import, that possibility would seem confined to the person of Meyer, as Consolo's only customer. Meyer does not distribute Panama Ecuador Shipping Corporation's bananas (Tr. 1362), and, as Meyer's own testimony has just shown, he does not distribute Consolo's bananas in competition with those imported by Panama Ecuador Shipping Corporation.

Consolo thus has not shown the "existing and effective" and "actually competitive" essential to establish the substantive element of discrimination or prejudice which is the backbone of his case. He has shown the precise opposite.

Forewarned by this misfortune in his fellow complainant's case, Banana Distributors' witness, Adir, took a different tack. On direct examination his testimony matched Consolo's studied obliqueness (Tr. 920):

"Q. Are they a direct competitor of yours in the importing and distribution business? A. Yes, they and all the other importers of bananas."

On cross-examination, Adir, pressed for elaboration or explanation of this generality, was able to offer only additional generalities and eventually was led by his enthusiastic self-admiration into inconsistencies. Undeterred by

Meyer's forthright testimony to the distinct contrary, he offered unsupported assertions of a universally competitive relationship between everyone in the banana business and the unique theory that all bananas compete with all bananas (Tr. 1017-20):

"Q. You testified that Panama Ecuador is in competition with you. Can you tell us to what extent?

A. All bananas imported, no matter by whom, are in competition with the other bananas imported. It is a market commodity.

"Q. But you can't pinpoint any certain percentage or anything like that? A. I told you that we do sell some customers together, but even the ones that we don't sell together, they are in competition. They may be in the same area or we may not be able to sell their accounts, they may not be able to sell ours. I don't just mean direct competition where we buy for the account or sell them jointly or along with United Fruit, but we may call on one account and have them for a customer and at a later date they may successfully sell them, or vice versa. That is the extent of competition. We compete with the United Fruit Company, also.

"Q. Do you compete with Standard Fruit Company?

A. Whoever brings in bananas competes. I don't suppose United would make that statement but any others than United would.

"Q. The price of bananas you obtain, are they similar to the prices Panama Ecuador obtains?

* * * *

"Q. You heard Mr. Dixon testify, or, rather, Mr. Meyer, and I believe Mr. Consolo testify, that the price of bananas generally at Philadelphia is the same that you can obtain in New York. Do you agree with that statement? A. You can sell bananas in Philadelphia and in New York for the same price, but we don't sell bananas most times for the price that—your question was, and I'd be glad to answer, do we get the same for our sales as Panama Ecuador does?

"Q. Yes. A. I would say that we get more.

"Q. You get more? A. So I would think or I am positive that if we sold bananas in Philadelphia we'd

get the same price that we get in New York, not that they get in Philadelphia.

"Q. And your price in New York is more than the price in Philadelphia? A. I think on an average cargo we average more per pound than they do."

Adir, Banana Distributors' only witness, did not suffer the embarrassment of hearing himself contradicted by a witness he had sponsored. But his lighthearted generalities, less vulnerable because less specific, did not advance his case nor cure the conflict in Consolo's. The fact that bananas can be sold for the same prices in the same areas from Philadelphia and from New York, if it is a fact, certainly does not demonstrate that Consolo or Banana Distributors are in competition with Panama Ecuador. Competition is the act of striving for something held by another.

Meyer's unhesitating disclaimer of competition with Panama Ecuador Shipping Corporation is confirmed by Friedlander who offered convincing and uncontradicted testimony as to why he is not in competition with Consolo and Banana Distributors. United Fruit is the dominant competitive force in the market, (Tr. 1616) a proposition to which Adir agreed, adding the confirmatory footnote that in the recent market anyone can sell bananas because of United Fruit's shortage of bananas (Tr. 1022).

Friedlander can get better prices by selling against United Fruit than against a small independent (Tr. 1615). Most of his accounts, and his best accounts, are jobbers who look to him to supplement what United Fruit supplies them (Tr. 1614). These accounts are the mainstay of his business; in toto, accounts who buy from him and also from other independents, including accounts who also buy from United Fruit, constitute at most 75 per cent. of his sales (Tr. 1616).

There is surely nothing in the testimony of the complainants that would justify a finding that there is an

“existing and effective” and “actually competitive” relationship between Consolo or Banana Distributors and Panama Ecuador Shipping Corporation. There is much in their testimony and in that of Friedlander to support a finding to the contrary. In the absence of such a competitive relationship, it was error for the Examiner to find that Flota had discriminated against the complainants in Docket Nos. 827 and 841 by contracting its space to Panama Ecuador Shipping Corporation, or that Flota has violated the Act in so doing. This result follows even if Flota were a common carrier of bananas, which Flota denies. This result also follows even if the Board should decide in response to the petition for a declaratory order in Docket No. 841, that Flota as a common carrier, is required under the decision of the Board in *Banana Distributors, Inc. v. Grace Line Inc.*, supra, to cancel its contract with Panama Ecuador Shipping Corporation.

* * * * *

POINT IV

Flota's argument as to the fourth exception.

The Examiner, in reaching the conclusion that Flota, like Grace Line Inc., is a common carrier of bananas capable of carrying bananas for multiple shippers under contracts for a two-year period, disregarded the credible and uncontradicted evidence offered by Flota and its shipper and based his findings purely on speculation. It then became apparent to the Examiner that once having embarked on this course as a basis for his decision, that he should attempt to rationalize his decision by suggesting ways and means to Flota as to the manner of loading, carrying and discharging the banana cargoes.

* * * * *

Mr. Consolo, although he knew that Flota had refrigerated space available for the carriage of bananas, revealed in his testimony that he was not only critical of the regu-

larity of the schedules (Tr. 274) but also the construction of the bottom chamber or lower hold claiming that the same were too high for the proper stowage of bananas (Tr. 276) and at least 25 per cent. of the space in that hold was lost because of that fact (Tr. 277).

This view as to the inadequacy of Flota's vessels as banana carriers was shared by Mr. Paletz, the principal officer of Banana Distributors, Inc. (Tr. 1061, 1062).

* * * * *

Mr. Visconti, a refrigerating engineer with considerable background, was of the opinion that it would take two hours for each hour the holds were open to bring the hold temperature down to the proper level (Tr. 1716) and applying this to Mr. Friedlander's estimates of additional loading time required if three shippers were to load from between seven to twelve hours, it would take between fourteen and twenty-four hours additionally to bring the hold temperature down to the proper temperature. Mr. Visconti was also of the opinion that some twelve additional hours would be required for the pulp to cool down to the proper hold temperature (Tr. 1745). He further testified that both the refrigerated holds of the Grace Line ships and United Fruit Company ships were built exclusively as banana carriers, while this is not true with reference to the Flota's ships (Tr. 1741, 1742). Mr. Friedlander testified that the physical characteristics of the Grace Line vessels which have only two decks in each hold permit the loading of 10,000 or 11,000 stems in each hold as distinguished from 15,000 stems loaded into the hold of Flota's vessels, in addition to the improved ventilating condition of the Grace Line ships and the greater refrigerating capacity, allow the Grace Line to service multiple shippers in one hold as distinguished from Flota's vessels (Tr. 1170, 1171).

In view of the facts presented in this proceeding, which are so basically different from the facts presented in both

Grace Line Inc. decisions *supra*, it is clear that this proceeding is distinguishable and that the Grace Line Inc. decisions, *supra* are inapplicable.

* * * * *

POINT V

Flota's argument as to the fifth exception.

Flota filed its petition for a declaratory order as to whether its contracts with banana shippers to Atlantic and Gulf ports had to be cancelled in view of the Board's ruling in *Banana Distributors, Inc. v. Grace Line Inc.*, *supra*.

Thereafter Consolo filed his complaint in Docket No. 827 and belatedly *Banana Distributors, Inc.* filed a similar complaint in Docket 841.

Counsel for Flota urged (Tr. 4) that proof should be offered on Flota's petition for a declaratory order first, which request was rejected (Tr. 6, 7) and the proceedings then continued by having the complainants' cases heard first. The Examiner, on motion made by complainants' attorneys (Tr. 831) and over the objection of Flota's attorney (Tr. 878-889), severed the issue of reparation thereby at the same time withdrawing from the proceedings any possible finding of a violation of Sections 14 and 16 of the Act. Therefore, the only remaining issue was that posed by Flota in its petition for a declaratory order, to wit:

"Whether Petitioner is required under the rulings of the Federal Maritime Board in *Banana Distributors, Inc. v. Grace Line Inc.*, Docket No. 771 and *Arthur Schwartz v. Grace Line Inc.*, Docket No. 775, to cancel the contracts which it has with its present shippers for the carriage of bananas from Ecuadorian ports to United States ports."

The issue therefore having been removed from the proceedings as to whether or not reparations were to be considered and also whether or not there was a violation of Sections 14 and 16 of the Act, the Examiner, in finding such a violation in his recommended decision (page 16, Finding No. 2), went beyond the scope of the issues before him and accordingly such finding of a violation of Sections 14 and 16 of the Act could not be supported under the very ruling made by the Examiner whereby the issue of reparations was deferred.

[Certificate of Service dated March 5, 1959.]

UNITED STATES OF AMERICA

VS.

FEDERAL MARITIME COMMISSION

IN MATTER OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FROM ORDER OF THE
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER,

vs.

FEDERAL MARITIME COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,366

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and

THE UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and

THE UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

Petition for Review of an Order of the
Federal Maritime Board

Supplemental Joint Appendix—Filed December 7, 1961

[fol. 248]

BEFORE THE FEDERAL MARITIME BOARD

HERMAN GOLDMAN
Attorney & Counselor At Law
Equitable Building
120 Broadway

Tel. REctor 2-5535

Cable Address:
"Goldenlaw"

New York 5, N.Y.

February 6, 1959

Federal Maritime Board
Washington 25, D.C.

Re:

Docket No. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

Docket No. 835—Flota Mercante Grancolombiana, S.A.
—Carriage of Bananas from Ecuador to the United States.

Docket No. 841—Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S.A.

Gentlemen:

Pursuant to §201.230 of the Rules of Practice and Procedure request, on behalf of Panama Ecuador Shipping Corporation, is hereby made for an enlargement of fifteen (15) days time within which to file exceptions and a brief in support thereof to the decision recommended by Examiner C. W. Robinson, which said decision was served on February 4, 1959.

The enlargement of time which is requested is urgently required adequately to deal with such recommended decision for the reason that the premises upon which the decision proceeds are, I believe, contrary to or without foundation in the record. In order to establish that such is the

case, and to comply with the requirements contained in §201.228 of the Rules, and specifically the requirements therein contained that alleged errors be stated with particularity and with references to the pages of the transcript and exhibit numbers, it is necessary that the transcript of the proceedings, which numbers approximately 1900 pages, and more than 100 exhibits be carefully considered.

[fol. 249] I believe that the substantial interest of Panama Ecuador Shipping Corporation in these proceedings cannot adequately be conserved or protected if in the preparation of exceptions and brief in support thereof the time to file such exceptions and brief is limited to the fifteen (15) day period provided by §201.228.

Apart from the foregoing consideration the enlargement of time is sought for the further reason that Elias Rosenzweig, who is the attorney in my office who has had charge of and is most familiar with this matter, will, apart from other previously scheduled business engagements, be engaged within the balance of the fifteen (15) day period remaining under §201.228 in (a) a trial of an action of an expected two days duration, (b) a hearing in an arbitration proceeding which it is anticipated will consume one day, and (c) at least two examinations before trial in actions now pending in the United States District Court for the Southern District of New York which examinations will consume the better part of two days.

It is, therefore, respectfully submitted that the enlargement of time herein requested be granted and that the time of Panama Ecuador Shipping Corporation to file exceptions, and brief in support thereof, to the recommended decision be extended to and including March 6, 1959.

Respectfully submitted,

Herman Goldman

Attorney for

Panama Ecuador Shipping Corporation

BEFORE THE FEDERAL MARITIME BOARD

February 10, 1959

Mr. James L. Pimper
Secretary
Federal Maritime Board
Washington 25, D. C.

Re: Dockets 827, 835, 841

Dear Mr. Pimper:

This refers to Mr. Goldman's letter of February 6, 1959, on behalf of intervener, Panama Ecuador Shipping Corporation, requesting an enlargement, until March 6, 1959, of the time within which to file exceptions in these proceedings. We oppose the request, for the following reasons:

[fol. 250] (1) The letter asserts that additional time is required so that the record may be "carefully considered." But Panama Ecuador submitted a 50-page brief to the Examiner which cites the record in great detail. It thus would appear that most of the work already has been done.

(2) Panama Ecuador re-intervened in these proceedings at a late stage during the hearing (after once successfully demanding that it be let out of the case). Its petition for intervention was granted at the hearing only after the Examiner received assurances that the late intervention would create no delays (Tr. 1048-53). The delay now sought is in direct conflict with representations made in the petition for intervention. As a late intervener, Panama Ecuador's interest in delay must be subordinated to the interests of complainant, Philip R. Consolo, who is still being denied the right to ship via Grancolombiana in defiance of two prior decisions of the Board.

(3) The letter states that Mr. Rosenzweig has commitments which will occupy a portion of his time during the balance of the 15-day period remaining before exceptions are due. We would like to accommodate counsel, if it were possible to do so without jeopardizing the interests of our

client. However, since the conflicting engagements will consume only a fraction of the 15-day period, we must oppose any extension of time. Inasmuch as the record already has been fully briefed, no convincing reason is shown why exceptions may not be prepared in the period allowed.

Very truly yours,

Robert N. Kharasch
William J. Lippman

Attorneys for Complainant
Philip R. Consolo

cc. All counsel

[fol. 251]

BEFORE THE FEDERAL MARITIME BOARD

April 2, 1959

James L. Pimper, Esq.
Secretary
Federal Maritime Board
Washington 25, D. C.

Re: Docket Nos. 827, 835, 841

Dear Mr. Pimper:

~~This refers to the notice setting these proceedings for oral argument before the Board on June 10, 1959.~~

In the circumstances of this case, the delay of more than two months would be highly prejudicial to the interests of our client. We therefore request that the date be advanced so that the argument may be held at the Board's earliest convenience, for the following reasons:

(1) Consolo's complaint has been pending since November 15, 1957. The complaint alleges unlawful exclusion from shipping facilities. Any unreasonable delays in the final decision, therefore, serve to perpetuate the exclusion

—found by the Board in *Consolo v. Grace Line*, 4 F.M.B. 273, and *Banana Distributors v. Grace Line*, 5 F.M.B. —, and by the Examiner in his recommended decision in this case to have been unlawful.

(2) Since his complaint was filed, complainant has diligently prosecuted it before the Board. Respondent Gran-colombiana also has expressed an interest in obtaining a speedy determination of the issues, perhaps with a view to minimizing reparations. Intervener Panama Ecuador, however, is now and for several years has been monopolizing the refrigerated facilities. Its participation in the case has been characterized by repeated attempts at delays. A further long delay for oral argument thus amounts to a wind-fall to Panama Ecuador, and grants it an extension of its monopoly.

Because most of the issues in this case have previously been considered by the Board, a relatively brief and simple oral argument is required.

If any early argument is at all possible, we urge that in [fol. 252] the interest of justice, to avoid real prejudice to a diligent litigant, the case should be set for quick hearing.

Very truly yours,

Robert N. Kharasch

Attorney for
Philip R. Consolo

cc. All counsel
bcc. Philip R. Consolo

BEFORE THE FEDERAL MARITIME BOARD

HERMAN GOLDMAN
Attorney & Counselor at Law
Equitable Building
120 Broadway
New York 5, N.Y.

April 7, 1959

James L. Pimper, Esq.
Secretary
Federal Maritime Board
Washington 25, D.C.

Re: Dockets 827, 835, 841

Dear Mr. Pimper:

I refer to the letter of April 2, 1959 addressed to you by Mr. Kharasch regarding the notice fixing the date for oral argument to the Board and requesting that the date of such argument be advanced.

I would suppose that the date fixed by the Board for such argument was the earliest date which suited the convenience of the Board with due regard for the other business which the Board has before it. Implicit in Mr. Kharasch's request is the suggestion that other matters be deferred and that his client be preferred—such preference to be afforded because Consolo's complaint was "diligently prosecuted" before the Board and Panama Ecuador's "participation in the case has been characterized by repeated attempts at delays".

I would not trouble to address this letter to the Board were it not for the fact that it has become impossible further [fol. 253] to suffer uncomplainingly the unjust insinuations which Consolo's counsel now spread on the record for a fourth time—such insinuations have already been contained in their brief to the Examiner, their main brief to the Board, and in their reply to Panama Ecuador's exceptions. The time has come to set the record straight.

A—As to the “diligent prosecution” of Consolo’s complaint:

1) I know of no action taken by Consolo’s counsel to expedite the hearings in these dockets, and I believe that the record will demonstrate that such counsel did nothing other than to proceed with the matter in the regular, normal course which like matters pursue before the Board. If this be the “diligent prosecution” of which Mr. Kharasch speaks it should not serve to obtain for him or his client a preferred position.

2) I believe that Consolo or his counsel delayed the proceedings on the common carriage issue. The record will disclose that it was at the insistence of Consolo’s counsel that the issue of reparation was tried first. Session after session before the Examiner was consumed in putting in the proof of Consolo’s alleged damages, and it was only on the motion of Banana Distributors that an end was finally put to that time consuming procedure and the hearings turned in the direction of the issue of common carriage, the sole issue before the Board.

3) “Diligent prosecution” would, I believe, comprehend compliance with the Board’s rules. Such rules require that copies of briefs be dispatched to other counsel in such good time as to permit of their receipt by such other counsel on the date the brief is due to be filed with the Board. Consolo’s counsel has consistently ignored this requirement. Copies of their brief to the Examiner and their principal brief to the Board were first mailed to other counsel on the filing date. Their reply to the exceptions of Panama Ecuador and Flota Grancolombiana was due on March 21. In fact it was not served on the Board until March 23 on which date copies were first mailed to other counsel. I do not write of this failure of Consolo’s counsel to comply with the Board’s rules as a suggestion that such briefs be not considered but only to point out that Mr. Kharasch’s assertion of “diligent prosecution” is one to which he would have difficulty in gaining adherents.

[fol. 254] B—As to the “attempts at delays” by Panama Ecuador:

1) The record will demonstrate that Panama Ecuador's witnesses were available when required and testified without prolixity. The record will also disclose that the time consumed in cross examining Panama Ecuador's principal witness probably exceeded by far the time consumed in his direct examination.

2) Mr. Kharasch's letter fails to particularize the "repeated attempts at delays". I assume they refer to (a) the refusal to waive briefs to the Examiner and (b) the application for a brief extension of time within which to file exceptions to the Examiner's recommended decision. Suffice it to say that in both instances the Examiner upheld Panama Ecuador's position. Perhaps the best proof of the fact that Consolo's counsel required the time allowed by the Examiner consists of the fact that they utilized every minute of the allotted time—even, as heretofore observed, at the expense of compliance with the rules.

Lastly, I would point out only that Mr. Kharasch's suggestion that only "a relatively brief and simple oral argument is required" does not square too readily with his request for 1½ hours time for oral argument. I note also that he has studiously avoided mention of the fact that the reversal by the Court of Appeals of the Board's decision in the Banana Distributors case casts a new complexion on the whole matter and makes it one of considerable complexity.

Very truly yours,

cc All parties

[fol. 255] Service (omitted in printing).

BEFORE THE FEDERAL MARITIME BOARD
Docket No. 827 (Sub. No. 1)

PHILIP R. CONSOLO, Complainant,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Respondent.

SUPPLEMENTAL COMPLAINT—Received November 18, 1959

Complainant alleges upon information and belief:

1. The allegations of paragraphs 1 through 10 of the original complaint in Docket 827 (copy attached hereto and marked Appendix A) are repeated and incorporated herein.

* * * * *

Wherefore, complainant requests that in addition to the relief requested in his original complaint in Docket 827, an order be issued by the Board (a) ordering Grancolombiana to pay reparation to complainant for his damages during the period November 15, 1957, through September 1, 1959, in the amount of \$250,000 and (b) awarding such other and further relief as the Board may determine to be just and reasonable.

Philip R. Consolo, 4425 North Michigan Avenue,
Miami Beach, Florida, By: Robert N. Kharasch,
Attorney.

* * * * *

[File endorsement omitted]

[fol. 256]

BEFORE THE FEDERAL MARITIME BOARD

* * * * *

BRIEF OF FLOTA MERCANTE GRANCOLOMBIANA, S.A.—
July 7, 1960

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[fol. 259]

BEFORE THE FEDERAL MARITIME BOARD

Complainant found injured to the extent of \$259,812.26 by respondent's refusal to allocate to him refrigerated space on respondent's vessels for the carriage of bananas from Ecuador to North Atlantic ports of the United States, and reparation in that amount should be awarded, with interest.

Robert N. Kharasch and William J. Lippman for complainant.

Renato C. Giallorenzi and John H. Dougherty for respondent.

RECOMMENDED DECISION OF C. W. ROBINSON, EXAMINER,
ON REPARATION—October 5, 1960

In *Philip R. Consolo, et al. v. Flota Mercante Gran-colombiana*, 5 F.M.B. 633 (1959),¹ the Board found, among other things, that respondent (Flota) was a common carrier by water between the west coast of South America and North Atlantic and Gulf ports of the United States, and

¹ A consolidation of Docket Nos. 827, 835, and 841.

that its practice of contracting all of its refrigerated space on vessels in those trades to one shipper of bananas to the exclusion of other qualified shippers of bananas, was unjustly discriminatory and unduly and unreasonably prejudicial and disadvantageous, in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916. Nos. 827 and 841 were held open for further action on the claims for reparation, if any. On September 1, 1959, in compliance with the Board's order, Flota executed space contracts with all qualified shippers of bananas.

A supplemental complaint was filed by complainant Consolo (No. 827 (Sub. No. 1)) on November 18, 1959, the allegations of which are generally the same as those in No. 827. The avowed purpose of the supplemental complaint is a "probably unnecessary precaution against the running of the statute of limitations following the date of the first complaint" (footnote 2, page 2, of complainant's opening brief on reparation). Hearing on Consolo's claim [fol. 260] for reparation has been held, and the parties have filed opening and reply briefs.

The Board has found Consolo to be an experienced and qualified banana shipper (5 F.M.B. 635, 638). Although respondent delved into that phase of the matter during the reparation hearing, ~~no serious point is made of it on brief.~~ There is therefore no need for discussion of complainant's ability to finance the shipments upon which his claim for reparation is based. It is undisputed that an ample quantity of good bananas was available to Consolo in Ecuador had he been able to secure space on Flota's vessels. Flota argues that Consolo should have tendered bananas when he applied for space, but with a commodity as perishable as bananas, their tender would not have been a very smart move on Consolo's part, and certainly he was not required to perform such a "futile and idle act." *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 303 (1953). Tender was not required in *Hernandez v. Bernstein*, 116 F.2d 849, 852 (2d Cir. 1941).

In assessing the possibility of sales of bananas which Consolo might have imported on Flota's vessels had he been permitted to ship, it should be borne in mind that the volume

would not have been in addition to the quantity actually handled by Flota since it would have been stowed in space which other shippers were occupying. Intervener Panama Ecuador Shipping Corporation (Panama Ecuador), which had *all* the space but gave it up subsequent to the Board's decision on the merits, now charters entire vessels and imports 31,000 more stems of bananas each week than it did when shipping via Flota and via Grace Line, Inc.

The bananas Consolo would have had on the Flota vessels would have been sold at the prevailing market prices at the principal North Atlantic ports. The prices were substantially the same at all of those ports. Wholesalers and jobbers of bananas require a continuing supply of fresh fruit because of the perishable nature of the commodity, hence the more vessel arrivals there are the better opportunity the importer has to market his fruit at favorable prices.

[fol. 261] The sale of bananas on the wholesale level is highly competitive, and purchasers generally are not tied by contract or otherwise to a particular importer. The record is clear, and it is so found, that Consolo could have sold all the bananas he would have been able to import on Flota's vessels had he been able to secure space.

It having been found that Consolo was an experienced and qualified shipper of bananas, that he was denied space unlawfully on Flota's vessels, that an adequate supply of good-quality bananas was available to him in Ecuador during the times under consideration, that he was financially able to purchase the fruit, and that he could have sold the fruit at market prices had he been able to utilize Flota's vessels, the remaining issue is the amount of reparation to which he is entitled, if any.

Generally, the measure of damages for failure of a common carrier to accept a shipment is the difference between the value of the commodity at the place it would have been tendered and its value at destination, less the cost of transportation. *McLean v. Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 49 (1906); *Sonken-Gulamba Corp. v. A.T. & S.F.*, 124 F.(2d) 952, 958 (8th Cir. 1942). Flota contends, however, that Consolo could have minimized his damages by

utilizing other available transportation, three possibilities being suggested: (1) Grace Line, (2) Chilean Line, and (3) charter of vessels.

(a) During the period under consideration there was no additional space available to Consolo on the Grace ships, and even when some of the Grace shippers relinquished their space in 1958 Consolo was unable to obtain any of it.

(b) In September 1955, when the hearings commenced in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) and 5 F.M.B. 615 (1959), Chilean Line was not a satisfactory carrier of bananas because of its irregular service and transit time. The service had improved to such an extent in 1958, however, that Consolo booked the entire available refrigerated space for five consecutive voyages. During this period Consolo requested space for an additional 18 or 24 months but was refused. After Chilean Line had circularized the trade in 1959 for prospective shippers, [fol 262] replies were received from Consolo and one Chilean company, the latter eventually receiving the space. Even as late as May 1960 (the time of the present reparation hearing) Chilean Line did not furnish a weekly service such as is furnished by Grace Line and Flota. Furthermore, Chilean Line generally carries no bananas during the Chilean fruit season (December-May).

(c) Although Consolo was required to use reasonable efforts to minimize his damages, this does not mean that he should have chartered entire refrigerated vessels. It ill-behooves a common carrier, which has failed in its duty to perform for the public in general, to insist on such extreme counter measures by a shipper deprived of space.

Consolo's first attempt to secure space on Flota's vessels was late in 1954. Further discussions were had in the spring of 1955, at which time Consolo inspected the space on one vessel. A fixed price for the space was set by Flota, but since Consolo was not satisfied with the physical characteristics of the facilities, he made a counter offer, which was rejected. In July 1955 the space was leased to the organizers of intervener Panama Ecuador. Consolo again

inquired about space possibly late in 1955 and also in 1956, but was told that all of it was under contract. By letter of February 26, 1957, Flota advised Consolo to submit any bid to the home office in Ecuador. This was done by letter of March 6, 1957, directed to the entire space on five vessels. By letter of June 21, 1957, Consolo was informed that the space had been given to another firm (Panama Ecuador interests). In the meantime, on April 29, 1957, the Board had found that Grace Line was a common carrier of bananas from Ecuador to the Atlantic coast of the United States, and that its refrigerated space should be pro-rated among qualified shippers of bananas (the Board's order was dated August 19, 1957). *Banana Distributors, Inc. v. Grace Line, Inc., supra*. As the result of this action by the Board, Consolo wrote to Flota on August 23, 1957, and stated that "before issuing any allotment of space on your ships, I wish to be considered for a fair and reasonable amount since I have consistently been asking for space on your ships for the past two years." Flota informed Consolo by letter of [fol. 263] October 7, 1957, that all refrigerated space on its vessels had been committed for the following two years, but that it would be pleased, at the end of that time, to consider Consolo's application for an allotment.

It is apparent that Consolo was interested primarily in the entire space on the Flota vessels until after the *Banana Distributors* decision, even though the Board had passed favorably on his earlier claim against Grace Line for the same general relief (*Philip R. Consolo v. Grace Line*, 4 F.M.B. 292 (1953)), and that in his negotiations with Flota he did not take into consideration the interests of other banana shippers until his demand of August 23, 1957. Flota's status as a common carrier of bananas did not squarely arise until Consolo's demand of August 23, 1957 (and that of *Banana Distributors* in the same month, *infra*), hence any reparation to which Consolo is entitled must have its genesis as of that date.

Consolo predicates his damages on the use of $\frac{1}{3}$ of the space that could have been made available to him. Flota, on the other hand, contends that only 18.46 percent of the space would have been made available to Consolo. It there-

fore becomes necessary to determine (1) how many shippers either did ship or could have shipped bananas via Flota from August 23, 1957, to September 1, 1959, when all qualified shippers were given space, and (2) the portion of the total space each would or could have utilized during that period.

In addition to Consolo, another shipper ("Noboa", for short), admitted by Consolo to be experienced in the banana business, also submitted a bid for space in February 1957. Furthermore, the contract with Panama Ecuador was renewed for three years on July 19, 1957. On August 6, 1957, the attorney for intervener Banana Distributors wrote to Flota and requested 50,000 cubic feet of refrigerated space on each Flota vessel (approximately the full capacity) for an unnamed client. Banana Distributors itself wrote to Flota on August 26, 1957, and requested "immediate allocation to this firm of a proportionate amount of your refrigerated space." Both requests were rejected. Between June and November 1957, applications for space were filed by seven other persons or firms, but Flota made no investigation as to their financial qualifications. Under the circumstances, these seven applicants should not be here considered. Thus, on August 23, 1957, Consolo, Panama Ecuador, Banana Distributors, and Noboa were the only actual or potential shippers of bananas on Flota's vessels. Panama Ecuador's witness testified, however, that his company would not have accepted less than all of the space, a position confirmed when the company did not seek an allocation of space when Flota complied with the Board's order on September 1, 1959. This means, then, that only three persons or firms might have shipped between August 23, 1957, and September 1, 1959 (Consolo, Banana Distributors, Noboa). When Flota opened the space to qualified shippers it was found that only five were acceptable. As it finally shaped up, Consolo received 18.46 percent of the total space; this figure, referred to earlier herein, is the maximum proportion of space against which Flota believes *any* computation of reparation to Consolo should be made.

As his original complaint was filed on November 15, 1957, Consolo maintains as a matter of principle that from that time until September 1, 1959, he was entitled to half of the space, the other half to be credited to Banana Distributors. He is content, however, that a $\frac{1}{3}$ division is "appropriate" (Consolo's opening brief, pages 21-22). There is no evidence of sound probative value as to how the space would have been divided among Consolo, Banana Distributors, and Noboa had all three shipped during the period, hence it is concluded that an equitable proration would have been $\frac{1}{3}$ to each of the three. Although the conclusion here reached naturally is subject to *some* objection by the very nature of the situation, a certain amount of latitude must be allowed, and any doubt should be resolved in Consolo's favor. The law is satisfied with a practical solution. Of general help in that respect are *Power Comm'n v. Hope Gas Co.*, 321 U.S. 591 (1944); *Power Comm'n v. Pipeline Co.*, 315 U.S. 575 (1942); *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304 (1913).

In computing his damages, Consolo uses the loading, outturn, and liquidation sheets² for each shipment of bananas made by him on Grace Line vessels during the rep-[fol.265] aration period, and applies them against the space that would have been used on Flota's vessels at Flota's freight rates during the same period (Flota supplied its freight charges, stevedoring costs, and numbers of stems carried). This method of ascertaining damages is logical and fair under the particular situation here present. It is concluded and found that Consolo's damages are as shown in the following table.

Period	Voyages	Stems	Net profit ¹	1/3 net profit
8/23/57-9/1/59	105	1,133,927	\$779,436.78	\$259,812.26

¹After deducting freight, stevedoring, overhead, and miscellaneous expenses.

In addition to the sum of \$259,812.26, Consolo is entitled to interest at six percent from the date of arrival of each vessel from which he was shut out.

²Report of commission merchant rendered to importer, showing proceeds of sale, certain expenses, commission fee, and net proceeds.

Recommendation

The Board should find that Consolo is entitled to reparation in the amount of \$259,812.26, plus interest at six percent from the date of arrival of each vessel from which he was shut out.

C. W. Robinson, Presiding Examiner.

October 5, 1960

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[fcl. 267]

BEFORE THE FEDERAL MARITIME BOARD

* * * * *

EXCEPTIONS OF RESPONDENT FLOTA MERCANTE GRANCOLOMBIANA, S. A. AND BRIEF IN SUPPORT OF EXCEPTIONS—
December 2, 1960

* * * * *

For the reasons stated in the following brief, Flota Mercante Grancolombiana, S. A. ("Flota"), respondent in the above proceeding, hereby excepts to the Examiner's Recommended Decision on reparations served on October 6, 1960.

Exceptions

Flota excepts to:

1. The Examiner's ultimate recommendation that "Consolo is entitled to reparation in the amount of \$259,812.26 plus interest at six percent from the date of arrival of each vessel from which he was shut out."
2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.
3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on repara-

tions, dated July 7, 1960, and in Part III of the brief following these exceptions; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provisions of the Shipping Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly [fol. 268] thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959; and other errors set forth in the supporting brief.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other available transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, including, without limitation, the following:

(a) that Consolo is an experienced and qualified banana shipper, and that there is no need to consider his ability to finance shipment on which reparations are claimed (Rec. Dec., page 2);

[fol. 269] (b) that "it is undisputed that an ample quantity of good bananas was available to Consolo in Ecuador had he been able to secure space on Flota's vessels" (Rec. Dec., page 2);

(c) that Consolo was not required to make a tender in excess of his various letters requesting space (Rec. Dec., page 2);

(d) that the bananas Consolo claims he would have shipped on Flota's vessels would not have increased the volume of bananas delivered to the United States (Rec. Dec., page 2);

(e) that such hypothetical bananas would have been sold at the market prices which in fact prevailed during the reparations period (Rec. Dec., page 3);

(f) that the prices received by all importers at North Atlantic ports were the same (Rec. Dec., page 3);

(g) that the greater the supply of bananas, the better the price received (Rec. Dec., page 7);

(h) that Consolo could have sold all the bananas he would have been able to import via Flota;

(i) the findings beginning at the bottom of Rec. Dec., page 2, and continuing through the middle of page 3, desig-

nated "(a)", "(b)", and "(c)", dealing with mitigation of damages;

(j) that Flota acquired the status of a common carrier, and that this occurred on August 23, 1957 (Rec. Dec., page 5);

(k) to findings and conclusion that only three shippers should be considered in allocating Flota's space for reparations computation (Rec. Dec., pages 5-6).

15. The Examiner's failure to find that the renewal of Panama Ecuador's contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case;

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador;

[fol. 270] 17. The method of ascertaining damages employed by the Examiner (Rec. Dec., page 7);

18. The Examiner's failure to make subsidiary findings as to the components of the recommended \$259,812.26 reparations;

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota at pages 5-44 of its opening brief on reparations dated July 7, 1960.

* * * * *

BEFORE THE FEDERAL MARITIME BOARD

REPORT OF THE BOARD—Submitted January 25, 1961 and
decided March 28, 1961

Thomas E. Stakem, Chairman; Sigfrid B. Unander, Vice
Chairman; Ralph E. Wilson, Member.

By the Board.

I. Proceedings

By an order on June 22, 1959 the Board ordered that the proceeding docketed as No. 827 be held open for further proceedings on the claim of complainant, Philip R. Consolo (Consolo), for reparations, if any, (5 F.M.B. 633, 641) pursuant to Sec. 22 of the Shipping Act, 1916, as amended, (Act). The present proceedings are in response to a complaint to Docket No. 827 filed November 15, 1957 by Consolo requesting an order by the Board ordering Flota Mercante Grancolombiana, S.A. (Flota) to pay reparation for damages during the period November 4, 1955 through November 4, 1957 in the amount of \$600,000 and other relief and to a supplemental complaint filed November 18, 1959 (Docket No. 827, sub. No. 1) by Consolo requesting an order by the Board ordering Flota to pay reparation for damages during the period November 15, 1957 through September 1, 1959, in the sum of \$250,000 and for other relief.

By its report and order of June 22, 1959, served July 2, 1959, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959) the Board found Flota to be a common carrier by water in the operation of ships between the west coast ports of South America and United States Atlantic ports and found Flota's practice [fol. 271] of contracting all of its refrigerated space on its ships operating between Ecuador and ports on the North Atlantic coast of the United States to a single shipper to be unjustly discriminatory and unreasonably prejudicial in violation of the Act.

The further proceedings and hearing on the claim for reparations were had by an examiner who, on October 5, 1960, submitted a recommended decision that reparations were due in the amount of \$259,812.26. Exceptions and replies thereto were filed. Oral argument before the Board was held on January 25, 1961.

II. Facts

Consolo, an experienced and qualified shipper of bananas for many years between Ecuador and the United States

was found to have proven his complaint that Flota's practice of excluding him was in violation of Secs. 14 and 16 of the Act. The Board's findings of fact, conclusions, decision and order on this phase of the proceedings were entered of record and reported in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S.A.* (Supra).

In its report the Board found that Flota in the operation of its freight ships between Ecuador and the U.S. North Atlantic ports and U.S. Gulf of Mexico ports is a common carrier by water in the foreign commerce of the U.S. (page 638). No date was established for the beginning of such status, but Flota was shown to have operated since July 20, 1955 between Ecuador and the U.S. on an approximately weekly schedule with 5 ships and that it now operates 6 ships. Consolo did not use any of these ships until September 1, 1959.

Consolo first expressed an interest in space in the Spring of 1955 when he had a conference with Flota officers and "made inquiry as to the height of each chamber [for banana storage] and then the rate they were asking for the ships". He inspected a ship later and found fault with the height of the storage chamber. Consolo was given figures as to what Flota "wanted for the ships in its entirety" (sic) but he asked for a reduced rate on the lower chamber or for the two upper chambers at the proposed rates. The counter offers were rejected. Other negotiations, for a contract by [fol. 272] correspondence and by conversations in 1956 and 1957, did not result in a mutually acceptable arrangement. At no time before August 23, 1957 did Consolo ask for an allotment of space at a regular tariff rate, but accepted the prevalent trade custom of either bidding or negotiating for space on a contractual basis.

Consolo proved that he could have bought and sold 5,000 to 15,000 additional stems of bananas if Flota had allotted him space.

By a letter dated August 23, 1957 addressed to Flota at Bogota, Colombia, Consolo wrote asking "to be considered for a fair and reasonable amount" of space on Flota's ships. The letter referred to our dockets Nos. 771 and 775 as the

basis for this request. Flota's reply dated October 7, 1957 was that "reefer space on our vessels has been committed for the next two years".

By its order of June 22, 1959, served July 2, 1959 the Board ordered Flota to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916 as amended, not later than August 1, 1959". Respondent was also ordered to offer, within 10 days after July 2, 1959, all qualified banana shippers refrigerated space for the carriage of bananas. No proofs were introduced in the present proceeding to show how this order was complied with. An allotment of space was made by Flota September 1, 1959 when Consolo was one of five qualified shippers who applied for and were allotted space.

III. Discussion

Sec. 22 of the Act authorizes any person to file a sworn complaint "asking reparation for the injury, if any," caused by any violation of the Act. Exclusion of complainant, Consolo, from the use of Flota's common carrier service from Ecuador has been found to be a violation of the Act. Consolo filed a sworn complaint asking for reparations. An examiner conducted proceedings in which the issues were limited to ascertaining the period of injury and the computation of the amount due as damages for injury. The examiner recommended that complainant is entitled to reparation in the amount of \$259,812.56 based on 105 voyages during the period August 23, 1957 to September 1, 1959, yielding a net profit of \$779,436.78 of which Consolo was entitled to one-third.

In interpreting Sec. 22 in *R. Hernandez v. A. Bernstein Schiffahrtsgesellschaft*, 1 U.S.M.C. 686 (1937) the U.S. Maritime Commission held that defendants unjustly discriminated against complainant in violation of paragraph Fourth of Sec. 14 of the Act by refusing to book cargo in response to applications by complainants for the trans-

portation of automobiles. Complainant was shown to have exported unboxed automobiles by securing steamship booking and then purchasing the automobiles therefor. Complainant was also shown to have the ability to obtain automobiles for shipment. In some cases complainant also had small lots of automobiles available in New York ready to ship to Bilbao, Spain before booking. Defendants were shown to have held themselves out as common carriers of unboxed automobiles from New York to Bilbao. Their ships were constructed to accommodate automobiles and capacity was available. The number of automobiles required to fulfill complainant's contract to sell to a dealer in Spain was shown. Complainant proved a loss of 15% profit on prospective shipments. Proximate injury was held to have been caused complainant because of his inability to supply automobiles pursuant to an agreement with the importer in Spain. The case was assigned further hearing to determine the amount of reparations due, in the absence of evidence (1) that all the cars upon which reparation was based could have been carried by defendants, (2) as to the amount of space which was available and, (3) as to the value of the cars which could have been carried in such available space.

In *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 2 U.S.M.C. 62 (1939) the above elements were proven and reparations equal to the estimated net profits that would have been earned during the reparations period were established.

The defendants having failed to comply with the order, the appellant brought suit for enforcement pursuant to Sec. 30 of the Act. The defendants resisted enforcement on the ground that (1) there was no basis for the plaintiff's [fol. 274] claim and (2), it was plaintiff's duty to mitigate any damages. The District Court agreed in *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 31 F.Supp. 76 (D.C.N.Y. 1940), but on appeal Circuit Court, reversed in 116 F.2d 849 (C.C.A. 2d, 1941) stating that the District Court raised too high a standard on which to test the proof as to damages as found by the Commission. The Court

held that where the Commission's findings "are supported by substantial evidence . . . and where no new evidence on the subject is introduced . . . it is the duty of the court to accept and give them effect". The duty of the court is equally that of the Board. The basis for plaintiff's claim was found to exist and the Court stated that "burden to show a failure to mitigate the damages was upon the defendants".

In the reparation hearing in *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248 (1950), the Board found that the complainants had not sustained the burden of proof because of want of proof on "cost, outturn and selling price" but in so holding acknowledged that damages are to be based on the difference between cost and selling price, where there was a refusal to furnish refrigerated space to the complaining fruit shippers.

The Supreme Court has held that ordinarily "the measure of damages in such case [refusal to carry] is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage." *New Mexico ex rel. McLean & Co. v. Denver & R.G.R. Co.*, 203 U.S. 38, 27 S.Ct. 1, 3 (1906). In accord are 9 Am. Jur. Carriers, §314, 3 Hutchinson on Carriers (3rd Ed.) §§1359, 1370, 2 Moore on Carriers §609, 13 C.J.S. Carriers, §33, and see *Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry. Co.*, 124 F.2d 952, 958 (C.C.A. 8th, 1942).

In the present case proof of damages meeting the specific standards of cost, outturn and selling price was offered in detail. Witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States. Consolo was shown to have the resources to buy and ship bananas. The loading sheets showing actual purchases and the outturn sheets showing actual [fol. 275] sales and "liquidation sheets" (report of commission merchant to importer showing proceeds of sale, expenses, commission and net proceeds) were used, for each shipment of bananas by Consolo on Grace Line ships during the reparation period. The space that would have been used

on Flota ships at Flota's freight rates during the reparation period was shown. Costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week. Freight charges were supplied from Flota's records of actual freight collected on its voyages during the reparation period. Stevedoring costs came from testimony of banana shippers as to actual cost at New York. We find the figures used in the reparation computation to be fully supported in the record. The computation itself, using the above data, established a dollar figure for profit or loss per banana stem shipped before stevedoring and freight. From the amount of profit per voyage the freight stevedoring and incidental administrative overhead and other expenses have been deducted. The examiner's conclusions were based on these fully documented facts.

Consolo excepted to the examiner's recommendation that the reparation period did not begin until August 23, 1957 and to the failure to recommend that Consolo be awarded reparation for the period November 15, 1955 through September 1959 inclusive. Consolo also excepted to an error in computing damages within the period August 23, 1957 to September 1, 1959 on the ground that the deduction from profit for stevedoring costs should be the cost for stevedoring in Philadelphia instead of New York. The New York costs were shown to be 48.8 cents per stem whereas the actual Philadelphia costs were later shown to be 35.15 cents per stem.

Flota excepted to the following:

1. The Examiner's ultimate recommendation.
2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.
3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and [fol. 276] during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on

reparations, and in the present brief; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provision of the Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other avail-

able transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

[fol. 277] 13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, listing certain findings of fact.

15. The Examiner's failure to find that the renewal of Panama Ecuador's (Panama-Ecuador Shipping Corporation, exclusive shipper on Flota's ships) contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case; (*Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957)).

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador.

17. The method of ascertaining damages employed by the Examiner.

18. The Examiner's failure to make subsidiary findings as to the components of the recommended \$259,812.26 reparations.

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota in its opening brief on reparations.

The arguments supporting the exceptions are essentially (1) that the Board did not, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana* (supra), find Flota guilty of violating the Act before June 22, 1959; (2) that in contracting all of its refrigerated space for bananas to a single shipper before then Flota acted legally, (3) that the failure of the Board or the Board's staff, prior to June 22, 1959, to give Flota a legal opinion, in response to a petition for de-

claratory relief, as to the validity of Flota's exclusive patronage contract prevents the Board from considering Flota as having acted wrongfully; (4) that the complaint and request for the losses are speculative, the claim for reparation is not bona fide, and the burden of proving loss has not been sustained; and, (5) the damages were incorrectly measured and computed and interest should not be added.

For the reasons given below, we agree in part only with the respondent's exceptions as to the computation of reparations and to the award of interest on reparations. The remaining exceptions are rejected. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

The 1st and 13th exceptions refer to the award of interest on reparations. We find that it would be inequitable to award interest on an unliquidated claim before it was due and disallow any interest on the award herein.

In exception 2 respondent argues that it acted reasonably and did not unjustly, unfairly or unreasonably discriminate against Consolo and therefore did not violate any statute during the period before the Board's order of June 22, 1959. In exception 3 the incompleteness of the findings is averred and in exception 4 failure to find inequity in an award is excepted to. Our report in 5 F.M.B. 633 has already held that in the past "Flota has acted in violation of Sec. 14, Fourth and 16 of the Act." (639). The facts and circumstances omitted all relate to more arguments that Flota did not violate the Act before June 22, 1959. Such facts and the issues they raise have already been considered and decided in the first proceeding and are not appropriate subjects for exceptions in the reparations phase of this docket. The examiner properly did not review these facts nor retry the issues they raise. The previous report on these issues is plain and is final as far as the Board is concerned. The only remaining issue was the measure of the reparation Consolo is entitled to under Sec. 22 of the Act. Facts bearing on this issue alone were all the examiner was required to consider.

The exceptions are also based on the argument that because Flota had contracted all of its space to another single shipper during the period involved reparations would be inequitable and unjust and the inclusion of voyages before June 22, 1959, when the favored shipper's contract was still being performed, was not proper. This argument, too, uses the erroneous premise that performance of the exclusive patronage contract, during a time when Flota unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable preference or advantage to particular persons, was a valid excuse for non-[fol. 279] performance of obligations under Secs. 14 and 16 of the Act. The performance of the contract is the very act which constitutes the violation of such sections. We have held that such conduct was improper in the following words: "It is . . . clear that they (Consolo and Banana Distributors, Inc.) were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, (supra at p. 638). In other words, as long as the contract caused the denial of space there was a violation. The violation did not begin June 22, 1959, but long before this. There can be no question of inequity or unjustness to a respondent who violates the Act by means of an exclusionary contract. It is the excluded shipper who has the equities on his side under the Act, not the favored shipper nor the discriminatory and preference-giving carrier.

One of the arguments advanced to prove absence of fault in failing to offer non-discriminatory and non-preferential service was (1) that Flota had filed a petition for declaratory relief (Docket No. 835, decided in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, 5 F.M.B. 633 (1959)) asking the Board to determine the validity of Flota's con-

tracts and to terminate the uncertainty that had arisen as a result of the conflicting demands upon Flota following the decision in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 and 5 F.M.B. 615 (1959) and, (2) that the Board failed to make a timely response thereto. It was not incumbent on the Board, however, to give Flota a legal opinion on the effect of its conduct on shippers. The demands were conflicting only to the extent that Flota made them so by continuing to serve favored shippers. The subsequent uncertainty was the consequence of Flota's own position that it could continue to contract refrigerated space to preferred shippers and to exclude complainants without violating the Act as was contended in *Grace Line v. Federal Maritime Board*, 280 F. 2d 790 (C.C.A. 2d 1960). In *Philip R. Consolo* [fol. 280] *v. Grace Line, Inc.*, 4 F.M.B. 293 (1953) and *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) the Board decided that Grace Line, Inc. was a common carrier by water under sufficiently similar facts as to lead the Board to state in the present case (5 F.M.B. 633) that what we said in the *Banana Distributors* case "is appropriate here, and we feel is dispositive of the issues in this proceeding". Instead of accepting the *Grace Line* cases as providing a rule for its guidance, Flota refused to offer service and litigated the issues relying on "arguments relating to the differences between Flota's vessels and Grace's vessels" (635) to justify such refusal. Flota was eventually found to have violated Secs. 14, Fourth, and 16 of the Act. No delay converted its past violations into lawful conduct and Flota must take the consequences of its refusal, (it became a common carrier in 1955) to take Consolo's cargo after Consolo asked for non-preferential service in 1957. Common carrier status is not created by nor are violations of the Act non-existent until the Board's report is served. Both are brought about by Flota's own actions beginning in 1955.

The 5th exception relates to the inclusion in the reparations calculations, of voyages after June 22, 1959, which is the date our report in No. 827 was "decided". The examiner extended the damage period to September 1, 1959

when Consolo was actually allotted space in response to the Board's order served on July 2, 1959. Respondents were ordered, within 10 days after the date of service of the order, to offer refrigerated space for the carriage of bananas on its ships to all qualified banana shippers. Flota made no offers between June 22 and July 12, 1959, but we have no reason to doubt that Flota would have offered space on July 12 if bananas had been tendered in Guayaquil at that time. None were tendered before then, as far as this record shows. No shipments were ready until September, but this does not furnish a reason for extending the damage period beyond the date when the Board's order should have been complied with, in the absence of any offer of proof by complainant of a refusal, after July 12, 1959, and in the absence of proof of its own willingness to ship, nor of a tender of cargo. The damage period should not be [fol. 281] extended to the time when the complainant shipper was ready to provide a cargo, but is limited to voyages departing from Guayaquil through July 12, 1959, the date when compliance should have begun. (Cf. *Swift & Company and Swift and Company Packers v. Gulf and South Atlantic Havana SS Conference, et al.*, Docket No. 854 Decided February 2, 1961.

The 6th, 7th and 8th exceptions all concern the proofs of injury offered by complainant and allege a failure to maintain the burden of proof or to show actual damage. The burden of proof was maintained by extensive testimony and exhibits showing availability of bananas, cost, selling price (226 quotations over a period of four years were shown) and freight, stevedoring and other expenses as noted above. The actual damages were shown to be the proximate result of violations of the statute. *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248, 249 (1950). The losses shown were not speculative, but fairly inferrible from the data supplied and testimony of witnesses that complainant would have shipped on Flota ships if he had not been excluded.

The 9th, 10th and 17th exceptions deal with the method of measuring and computing the damages. The examiner be-

gan the measure of damages from August 23, 1957 instead of 1955 as claimed. We agree that the examiner's date and with the finding that Consolo's offers and counter-offers for service before then were for contract carriage and not for space on a non-preferential basis. He was not excluded before then because he never sought an allocation of space on an equal basis with other shippers; rather, Flota's facilities or charges for services were not acceptable to the complainant on complainant's terms. These negotiations may not be translated into requests for a non-preferential allocation of space on a common carrier by water. What Flota refused during this period was the demand for a special contract which would make Consolo a favored shipper too.

The examiner found Consolo entitled to one-third of Flota's space based on the fact that complainant was one of three qualified applicants for space. Other applicants were declared to be unqualified. When space was finally allocated five shippers actually qualified and measurement by Flota's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, Consolo of 18.46% of the cubic capacity of Flota's ships on the U.S. Atlantic run. This actual experience with Flota appears to be a just and reasonable guide of what Consolo was entitled to for the purpose of measuring his past damages and it is adopted. Respondent's exception on this point is valid.

The 11th exception is found unsupported.

The 12th exception deals with complainant's failure to minimize damages by using other means of transportation. Once the failure to perform common carrier obligations and exclusion is shown, "the burden to show a failure to mitigate the damages was upon the defendants". *Hernandez v. Bernstein*, 116 F. 2d 849 (C.C.A. 2d 1941) at pp. 851, 852. Flota offered no such proof other than a suggestion that chartered ships might be used, but no suitable ones were shown to be available. Respondents have failed to show any mitigating factors.

Exception 14 relates to the examiner's subsidiary findings of fact on which the award of reparations is based. None is shown to be wrong, all have been fully established in this docket.

The 15th exception likewise assumes the untenable premise that discriminatory and preferential conduct did not exist until after the Board's decision on Consolo's complaint against Flota and that the contract which caused such conduct excused the disregard of statutory obligations.

The 16th exception is unsupported by the record.

The 18th and 19th exceptions relate to the ascertainment of damages. Complainant submitted extensive evidence of lost profits in the form of schedules of about 226 individual voyages between 1955 and 1959 showing for each voyage the number of banana stems actually carried by named ships on specified dates between Guayaquil, Ecuador and Philadelphia, Penna. (with the exception of two ships which discharged at Charleston, S.C. and Baltimore, Md. respectively because of a strike at Philadelphia, Penna.). In the absence of other proven data and of any disproof of the complainant's data or challenge of complainant's figures, such data and figures have been used in the computation of reparations found to be due.

[fol. 283] The complainant's profit per stem of bananas is the difference in cost at Guayaquil and the value or sale price at Philadelphia which is taken to be the total gross profit per stem. This amount has been multiplied by the number of stems on each shipment and the products added to get the gross profit. From such total gross profit there has been deducted (1) the total freight cost and (2) the total estimated cost of handling the bananas at Philadelphia. The latter amount is 50.15 cents a stem (35.15¢ for stevedoring, plus 3¢ for overhead, plus 12¢ for insecticides, rope and bags) multiplied by 1,061,286 stems carried during the reparation period. Complainant did not show the 3¢ a stem deduction for overhead in its claim, but this amount was deducted by the examiner with the subse-

quent admission by the complainant that it was a proper amount. The examiner's computation was also based upon the use of New York instead of Philadelphia stevedoring costs and omitted the deduction of the estimated incidental costs of handling bananas at Philadelphia in the amount of 12 cents. The latter figure was also furnished by complainant.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959, the use of the complainant's statement of profits per voyage totaling \$2,513,236.43 on all voyages allowed, and the subtraction therefrom of total freight in the amount of \$1,204,343.95 and incidental costs in the amount of \$532,234.93, as proven by complainant, we find the remainder is the proper net profit of \$776,657.55. Consolo is entitled to 18.46% of the net profit. An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

Thomas Lisi, Secretary.

[fol. 284]

BEFORE THE FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ORDER—March 28, 1961

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its findings of fact, conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is Ordered, That respondent Flota Mercante Gran-colombiana, S.A. be, and it is hereby notified and directed to pay unto complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

Thomas Lisi, Secretary.

[fol. 285]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

Vacated by Order of the Court (August 31, 1961).

Vacating so much of this order as consolidates No. 15,330 with Nos. 16,366 and 16,369.

Before: Wilbur K. Miller, Chief Judge, and Washington and Burger, Circuit Judges.

ORDER—August 11, 1961

This case came on for consideration on intervenor's motion to dismiss or in the alternative to require petitioner to file a bond and said motion was argued by counsel.

Upon consideration whereof it is Ordered by the Court that the aforesaid motion shall be held in abeyance pending hearing of this case on the merits.

It is Further Ordered by the Court, *sua sponte*, that this case and cases No. 15,330, *Flota Mercante Grancolombiana v. United States and Federal Maritime Board* and No. 16,366, *Consolo v. United States and Federal Maritime Board* are consolidated for the purposes of filing respon-

dents' brief, filing a single joint appendix and for argument.

Per Curiam.

Dated: August 11, 1961.

[fol. 288]

BEFORE THE FEDERAL MARITIME BOARD

Transcript of Proceedings—(Excerpts)—November 5, 1958

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Hearing Room 818
45 Broadway
New York, N.Y.

Hearing in the above-entitled matters was convened, pursuant to notice at 10:00 A.M., before C. W. Robinson, Examiner.

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JOSE J. BORRERO having been previously duly sworn, was recalled and was examined and testified further as follows:

Direct examination.

By Mr. Kharasch:

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Q. Would you look at this Exhibit 15, please, and tell me, what clause governs the ports at which your ships will discharge bananas in the United States along the United States Atlantic Coast?

A. Here, No. 1, for the transportation of bananas from Guayaquil or Puerto Bolivar or Esmeraldas, Ecuador, South America, to Philadelphia, Pennsylvania, U.S.A.

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Q. Mr. Borrero, please direct your attention to Clause 21 again on page 17. Now I asked you and you answered, yes, that the shipper had the option to carry on unloading op-

erations in Jacksonville, Charleston, and Savannah, and Norfolk, or Baltimore, and you answered, yes. Now, does not the next paragraph, after the first paragraph of 21, provide in the case where the shipper notifies Grancolombiana of his choice of another port, after the vessel has sailed from Ecuador?

Examiner Robinson: I think that just speaks for itself. [fol. 289] Mr. Kharasch: Well, apparently it does not for Mr. Giallorenzi. I think we ought to have the witness' agreement. If you will permit him.

A. Yes.

Q. You agree?

A. Reads that way, yes.

Q. Now, I will ask you the question which was objected to before. Would it be correct to say that under your present arrangement with your present shippers, your ships load at Guayaquil, Ecuador and come to North Atlantic ports at the discretion of the shipper?

A. Subject to those particular conditions.

Q. Subject to the fact that they are the only ports named?

A. These are the names before me, conditions of unloading.

• • • • •

Q. Well, the answer to my question is, no. Do you know where the ships now load, your ships now load bananas at Ecuador? The particular place? Port?

A. Well, the name of the port?

• • • • •

Q. It's either Guayaquil, or Puerto Bolivar?

A. Yes.

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Hearing Room 818
November 6, 1958
45 Broadway
New York, N.Y.

JACK FRIEDLANDER was recalled as a witness, and having previously been sworn, was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Q. How did the seventy - seventy-two pound compare to the weight of the fruit arriving in Philadelphia?

A. I'd say approximately three to five pounds heavier than Philadelphia.

[fol. 290] Q. Heavier in Philadelphia?

A. Yes.

Q. Is there a reason for the Philadelphia fruit being heavier than the New York fruit?

Examiner Robinson: City of Brotherly Love, of course.

A. I don't know. Generally our bananas come from different areas, and the area from which the Philadelphia fruit is loaded, probably runs a little bit heavier in weight. At one time we were running substantially heavier in New York than in Philadelphia.

Cross examination.

By Mr. Kurrus:

Mr. Giallorenzi: Have you loaded ships at Puna?

The Witness: Grancolombiana vessels? Never.

Mr. Kurrus: I said other than Puna.

A. We loaded at either Guayaquil or Puerto Bolivar.

* * * * *

Q. Mr. Friedlander, isn't it true that your total cost of bananas f.o.b. the vessel are greater in Puna than they are in either Guayaquil or Puerto Bolivar?

A. Substantially less in Puna.

Q. Do you pay an extra charge for transporting bananas to Puna than you not on the Grace Line ships, that you do not pay in transporting the bananas to the Grancolombiana Line ships?

A. Sometimes it costs us substantially less.

Q. Why is the cost greater on the Grancolombiana Line ships?

A. Cost of bananas from the area where we purchase the bananas is substantially higher.

* * * * *

Q. Assuming that you have Puerto Bolivar fruit to be loaded at Puerto Bolivar, how would it compare to load that fruit, the cost, I mean, how would the cost compare to loading that fruit at Puerto Bolivar as opposed to loading it at Puna?

A. I wouldn't load Puerto Bolivar fruit at Puna, proved too costly.

[fol. 291] Q. Have you done it?

A. Yes, we've done it.

Q. How did the cost compare?

A. It was approximately 5 per cent higher.

Q. How about Guayaquil fruit, if you loaded that at Puna, and loaded at Guayaquil, how would the cost compare to that?

A. That would be about 5 per cent higher. Again, we wouldn't do it. Just like buying potatoes, if you live in New York, and buying them in Chicago.

Q. Where does the fruit for the Grace Line ships originate?

A. Adjacent to Puna.

Q. Do you know whether any originates in Guayaquil?

A. Very, very seldom.

Q. Talking about your own?

A. Our own?

Q. Does any ever originate from Puerto Bolivar?

A. Very seldom.

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Redirect examination.

By Mr. Kharasch:

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Q. Now, does the fruit that loads on the Grace Line vessels come from the same area in Ecuador that is loaded on the Grancolombiana Lines?

A. Not usually.

Q. Does not in your practice?

A. Not usually, sometimes, yes.

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PHILIP R. CONSOLO was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lippman:

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Q. You mention Puna, where is Puna, Mr. Consolo in relation to Guayaquil?

A. Puna to the best of my knowledge is about 25 to 30 miles south of Guayaquil, just a body of water there that Grace Line ships are not able to come up to Guayaquil because of a draft problem, they picked this particular body of water and put up four poles and call it Puna, where the ship anchors we have to get down to Puna to load.

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[fol. 292] Q. Now, where does your fruit originate, Mr. Consolo?

A. Various areas.

Q. At the present time where does it originate?

A. Some originate from Vinkes, some originate from Baba, some originate from Duran and some originate from Balao.

Q. Are these places you mentioned closer to Guayaquil or Puna?

A. Three of the areas I mentioned are closer to Guayaquil and one area, Balao is of equal distance to Puna.

Q. If you can load your fruit at Guayaquil, would you be able to save any of these expenses?

Mr. Giallorenzi: I object to this question because the testimony is that the Grace Line vessels do not come up to Guayaquil because of the draft and I don't see how it has anything to do with proceeding for reparations.

Examiner Robinson: I don't either.

Mr. Lippman: Mr. Examiner, I think it has everything to do with the proceeding for reparations.

Examiner Robinson: Why?

Mr. Lippman: Mr. Consolo is establishing his costs at the present time. Now, in order to show that he is entitled to reparations we should be able to prove whether or not those costs were decreased if he had been a shipper on Grancolombiana Lines, if he had space on Grancolombiana Lines, in other words, neither one of those ships goes up to Guayaquil.

* * * * *

The Witness: Yes.

Q. Will you explain your answer? In what respect will you be able to save on the expenses?

A. As you notice as you go down these expense sheets where it says Naranjal, where it says Baba, fruit from this area, Duran, fruit from this area for a barge transportation or canoe transportation would be one sucres cheaper to Guayaquil than it is to Puna and on the stevedoring expense when we take men to Puna we have to pay one and [fol. 293] half the rate as is paid in Guayaquil, plus the cost of canoe and tug service to Puna, plus the meals that we have to provide the men.

* * * * *

Q. Suppose you had steamship space available enabling you to ship additional 14,000 stems or some lesser amount than you have been shipping, what effect would that situation have upon your costs in Ecuador?

A. None. As a matter of fact, it may lessen my overhead. I would have to maintain the same office and the same management and the only additional expense would be extra selectors for these additional shipments so that maybe instead of paying 7 per cent to the local company, I may have reduced that to 5 per cent, that is the only difference I could see.

Q. If you could ship a greater volume?

A. Yes.

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Hearing Room 818
November 7, 1958
45 Broadway
New York, N.Y.

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By Mr. Lippman:

Q. Mr. Consolo, at the conclusion of the hearing yesterday we were discussing the exhibit marked 24 for identification.

A. Yes.

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A. When I was discussing with Mr. Penaranda and Mr. Borrero there was a question of three ports to come to; either Baltimore—we talked about Philadelphia or New York.

Now, it is important in the banana business to try to get your bananas out to the port which after the ship leaves Buenaventura it comes directly to a North Atlantic port, which may be Baltimore first, which may be Philadelphia or New York, and they told me that Baltimore would be the first port that they would call at that time, probably Philadelphia—the first port before they would take off general cargo.

[fol. 294] When I wrote this letter I wanted to establish the port that they would come first before taking off general cargo, whether it was Baltimore, Philadelphia or New York, and I was in agreement to take either one of those three ports provided it was the first port of call into the United States before taking off general cargo, and of all my experience I never heard of a contract on a shipping company where a shipper can ask from ship to ship where he wants the ship to be discharged with prior notice before the loading. I have been operating with Grace Line for five years—

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Q. Are you able to obtain approximately 12,000 to 14,000 additional stems in Ecuador for export to the United States?

A. Yes.

Q. On what do you base your ability to do so, Mr. Consolo?

A. From our experience in Ecuador and the availability of bananas in Ecuador, our financial ability, and our know-how in the business.

Q. Would you be able to sell an additional 14,000 stems of bananas in the United States?

A. Yes.

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Q. On what do you base your ability to sell 14,000 stems of bananas a week in the United States?

A. With our present experience, with our commission merchants, with our commission agents, or selling them directly ourselves to the trade.

Q. Have you had any recent experience, Mr. Consolo, which demonstrates your ability to do this kind of thing?

A. Yes, I have.

Q. Would you explain what that consists of, Mr. Consolo?

A. August of 1958 I went into a temporary arrangement with the Chilean Line for the export of bananas from Ecuador to Baltimore. This is an irregular sched-

ule, calling Ecuador Puna—rather, every two weeks or less or more.

In other words, no regular set day for its arrival in Ecuador, and this was operated from two trips to two-trip basis, and the last one from trip to trip, and we were able to purchase bananas in Ecuador to load these ships and sell them in the United States at a comparatively [fol. 295] same sales and purchase them in Ecuador for approximately the same price that we purchased our regular shipments on the Grace Line.

Q. Mr. Consolo, at all times since November, 1955, could you have purchased up to an additional 14,000 stems of bananas in Ecuador for export to the United States?

A. Yes.

Q. At what price?

A. The same price we are paying—we paid during that period.

Examiner Robinson: Let's still tie it down a little further.

You say 14,000 stems?

The Witness: Yes.

Examiner Robinson: Over what period?

Mr. Lippman: I said at all times since November, 1955.

Examiner Robinson: I know.

Do you mean by that for each shipment, otherwise it could go for 14,000 stems over a three-year period?

Mr. Lippman: I think the record should clearly reflect that my question is premised upon 14,000 stems each week.

The Witness: Yes.

Q. Could you have purchased that amount of bananas?

A. Yes.

Q. In Ecuador?

A. Yes.

Q. At what price?

A. At the same price that we paid during that period.

Q. In connection with your Grace Line shipment could you have sold an additional 14,000 stems each week in the United States at prevailing market prices?

A. Yes.

Q. Could you have sold such bananas if they had arrived at Philadelphia instead of New York?

A. Yes.

Q. At what price?

A. About the same price.

Q. Would it have made any difference from the standpoint of the proceeds of the bananas if the vessel had arrived in Philadelphia instead of New York?

A. I don't see any difference.

[fol. 296] Mr. Kharasch: Mr. Examiner, may we go off the record for one minute?

Examiner Robinson: Yes.

(Off-the-record discussion.)

Q. Mr. Consolo, have you had any shipment on the Chilean Line which arrived at Philadelphia?

Mr. Giallorenzi: You didn't go to Philadelphia.

The Witness: They made one trip to Philadelphia. They requested it was more convenient for the ship to discharge there.

A. (Continuing) Yes, I think there was one shipment that went to Philadelphia.

Q. Will you speak up, please.

A. Yes, there was one shipment that went to Philadelphia.

Q. Which shipment was that?

A. That was shipment No. 4.

Q. When did that arrive in Philadelphia?

A. It arrived in Philadelphia October 24, 1958.

Q. What was the vessel?

A. The vessel was the steamship Maipo.

Q. How many stems were shipped on that shipment?

A. 6,168 stems.

Q. Were those bananas sold by R. Dixon & Co. for your account?

A. Yes, they were.

Q. Did that vessel arrive in Philadelphia?

A. Yes, arrived in Philadelphia at Pier 66, South Philadelphia.

Q. Did R. Dixon & Co. get the same price for those bananas as could have been obtained for bananas arriving on the Grace Line at the same time during the same period.

A. Yes.

Q. Were such prices, in fact, realized?

A. I should hope so.

Q. Mr. Consolo, could you refer to your records and show us?

A. Yes.

Q. This vessel arrived on October 24, 1958, is that correct?

A. That is correct.

Q. Would you refer to your records to show us the nearest arrival on the Grace Line, the arrival nearest to October 24, 1958?

A. October 23, 1958, the day before.

[fol. 297] Q. Which vessel was that?

A. That was the Santa Ines.

Q. That vessel arrived at New York?

A. Java Street, Brooklyn, New York.

Q. The bananas were sold in New York?

A. Yes, they were.

Q. What price was obtained?

A. Practically the same price.

Mr. Giallorenzi: Is that a responsive answer?

Mr. Lippman: You can read the prices, Mr. Consolo.

The Witness: Yes.

Q. What price was obtained on the bananas shipped on the Chilean Line?

A. The price obtained on the bananas shipped on the Chilean Line for select bananas was \$8.50 per hundredweight with the exception of one, two, three, four, five trailers. Two were received at \$8.00 per hundredweight, one was received at \$7.50 per hundredweight and two were received at seven cents per hundredweight.

Q. In those trailers how many stems were involved?

A. Those trailers that were involved: 280, 350, 321, 340, and 500.

Examiner Robinson: Let me ask you something. Did you actually mean a hundredweight or a hundred pounds?

The Witness: The price?

Examiner Robinson: No, on the stems. Do you mean a hundredweight or a hundred pounds?

Mr. Kharasch: There was also an expense of seven cents per hundred pounds.

The Witness: Seven dollars per hundred pounds.

Q. That was out of a total shipment of 6,168 stems?

A. I want to elaborate on these prices.

Q. What was the reason for the lower prices on those five truckloads?

A. In Ecuador we have one of our suppliers who has small fruit, referred to eight hands, instead of the regular.

Q. Is that the name of the supplier or the fruit?

A. The fruit.

Examiner Robinson: Off the record.

(Off-the-record discussion.)

[fol. 298] The Witness: We had a supplier on this particular shipment in Ecuador who had eight hand bananas who wanted to sell them to us and we agreed to buy them for about 40 per cent of the value of the others, and the cost sheet in Ecuador will so reflect the cost.

Although I received the prices I have stated per hundred pounds here I realized more profit in dollars than if I had bought regular nine hand and better at the prevailing prices in Ecuador.

Q. Will you refer—

The Witness: (Continuing) That was only a business adjustment. It has no reflection on profits where you see the lower price there.

Q. Will you refer to the Grace Line arrival of October 23rd.

A. Yes.

Q. What were the prices which those bananas were sold, Mr. Consolo?

A. All the select fruit was sold at \$8.50 per hundred pounds with the exception of one local trailer with a hundred stems at \$8.00 per hundred pounds.

Q. How did the ripes and rejects for those shipments compare, Mr. Consolo?

A. It varies on each cargo the amounts of ripes and rejects.

Q. What about the experience on this Chilean arrival as compared with the Grace Line arrival?

A. Some have a little less percentage of ripes on the Grace Line. I would have to go over the records.

Q. I am talking about this particular shipment.

A. The ripes and rejects of 6,168 was 215 stems ripes and rejects.

Q. That is the Chilean Line?

A. Yes.

Q. And the Grace Line vessel?

A. 5,624 stems, about 430 stems of ripes and rejects.

Examiner Robinson: Off the record.

(Off-the-record discussion.)

Q. The number of stems arriving on the Santa Ines, what was the total number?

A. I can see from this record it was 5,624.

• • • • •

[fol. 299] Cross examination.

By Mr. Giallorenzi:

• • • • •

Q. You testified that you were engaged in the banana business under the name of Philip R. Consolo?

A. My contract with Grace Line is under Philip R. Consolo.

Q. Do you engage in business under any other names since that date?

A. Yes. I have corporate names that I use.

Q. Will you please tell us the names of the corporations that you have used from 1953 to date?

• • • • •

A. We have operated in Ecuador under Pacific Fruit Company, and presently as Ecuador Fruit Company.

In the United States under Atlantic Fruit Company and as Dover Banana Company.

• • • • •

Q. Is that all?

A. There is others I have operated.

Q. In the banana business since the early part of 1953, is that right?

A. The early part of '53.

• • • • •

Q. Now turn to Ecuador Fruit Company.

A. Yes.

Q. Is that an Ecuadorian corporation?

A. Yes, it is.

Q. Are you an officer of that corporation?

A. Ecuador Fruit Company?

Q. Yes.

A. No, I am not.

Q. Are you a stockholder of that company?

A. Yes.

• • • • •

Q. Are you the sole stockholder of the company?

A. No, I am not.

Q. Are you the majority stockholder of the company, Mr. Consolo?

A. Yes, I am.

• • • • •

[fol. 300] Q. Is Ecuador Fruit Company the successor to Pacific Fruit Company, Mr. Consolo?

A. Yes.

Q. And Pacific Fruit Company was formed about three months after you received the Grace Line space contract?

A. Just about, I would say—three or four months, I don't know the exact time.

Q. This company is your buying agent, as I understand it, in Ecuador?

A. I don't say it's a buying agent—it's a buying company. It buys bananas to sell bananas.

Q. Will you explain that to me?

A. It is a company, it is a separate company operating in Ecuador under the laws of Ecuador to buy and sell bananas and go into any business that it deems necessary to go into.

It isn't confined just to buying and selling bananas. It's a corporation standing on its own right in Ecuador to do business.

Q. So that the two companies that it buys bananas for for distribution in the United States are yours and the Dover Banana Company?

A. Presently?

Q. Yes.

A. Yes.

Q. When was Dover Banana Company formed?

A. I would have to look at my records.

Q. To your best recollection, Mr. Consolo.

A. I believe in about 1957, April or May of 1957.

Q. Do you know under the laws of what state it was formed, Mr. Consolo?

A. I think it's under the law and State of Delaware.

Q. Can you tell me where the principal place of business is, Mr. Consolo?

A. Miami, Florida.

[fol. 301] Q. Are you the principal stockholder of this company, Mr. Consolo?

A. No, I am not.

Q. Do you know who is the principal—

A. Yes.

Q. Would you tell us, please?

A. Charles Consolo.

Q. That is your brother?

A. Yes.

Q. Are you an officer of this corporation?

A. No, I am not.

Q. Are you a director of this corporation?

A. No, I am not.

.

Q. Does Dover Banana Company have a space contract with Grace Line?

A. No, it does not.

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Q. I notice on your Exhibit 26, outturn report of R. Dixon—

A. Yes.

Q. (Continuing) —involves a shipment which arrived on October 23, 1958 on the Santa Ines?

A. Yes.

Q. This statement you testified was prepared by your agent, R. Dixon & Co., is that right?

A. That is correct.

Q. I notice that it is addressed to Dover Banana Company, Inc., is that right?

A. Yes.

Q. Were these bananas imported for the account of Dover Banana Company, Inc.?

A. Yes, they were.

Q. That was using your space?

A. That is correct.

Q. Did you receive any compensation for that, from Dover Banana Company, Inc.?

A. Yes, I did.

.

Q. Since Dover Banana Company, Inc. was formed, do you know how many shipments of bananas were carried on the Grace Line for its account?

A. Well, I would have to go back to the records to find out how many.

[fol. 302] A. October 30th there would be sixty-five shipments from Dover Banana Company.

Q. They were all on the Grace Line, which you held the space contract, is that right?

A. Not I alone.

Q. Would you please explain to us what you mean by that last statement, Mr. Consolo?

A. I had three-quarters of a chamber and Charles Consolo has one-quarter of a chamber.

The Witness: Yes. Charles Consolo is my brother and associated in this business.

Q. Did the Grace Line enter into a space contract with your brother?

A. Yes.

Q. Was that in the name of Dover Banana Company, Inc., Mr. Consolo?

A. Yes.

Q. Or Charles Consolo?

A. Charles Consolo.

Q. So that the sixty-five shipments which were carried on the Grace Line were outturned from that one particular chamber that you and your brother have individually?

A. That is correct.

Q. And the sale of these bananas, the proceeds, were credited by R. Dixon & Co. to Dover Banana Company, Inc., is that right?

A. That is correct.

Q. Did you have an agreement with Dover Banana Company, Inc. for the purpose of letting them use the space on the Grace Line vessels which amounts to three-quarters of one chamber?

A. Do I have an agreement?

* * * * *

Q. Do you have any such agreement?

A. Not in writing. There is no written agreement.

Q. Do you have an oral agreement for them to use this space, Mr. Consolo?

A. They are using the space for the importing of the bananas into the United States.

[fol. 303] Q. Is that pursuant to an oral agreement that you entered into with Dover Banana Company, Inc?

Examiner Robinson: If it is not in writing, I think we will have to assume it is.

Mr. Giallorenzi: All right.

Q. When did you enter into this oral agreement with Dover Banana Company, Inc. where you allowed them to use three-quarters of your chamber on the Grace Line?

The Witness: Let me verify that a little bit. The first nineteen shipments under Dover Banana Company—eighteen, rather, was the space held under Philip R. Consolo.

Q. On the Grace Line?

A. Yes.

Q. Go ahead.

A. Then I think October—the next shipment from there on was three-quarter space under my name, when the new contracts came out, and one-quarter space under Charles Consolo.

Q. When did you enter into this oral agreement with Dover Banana Company wherein you allowed them to use three-quarters of your space, all of the three-quarters of the chambers which you had contracted with Grace Line?

Mr. Kharasch: Before you answer that question, Mr. Consolo—

I have a continuing objection to this inquiry, because it does not bear on the issues in this case, and I want to advise Mr. Consolo of his—I guess it is a constitutional right to consult with his attorneys if he wishes to, before he answers questions along this line.

Mr. Giallorenzi: Now I have something to say about that, Mr. Examiner.

Examiner Robinson: You do not have to say anything. I have already ruled that it is all right.

* * * * *

Mr. Lippman: Mr. Examiner, I want to interpose a further objection on the ground that there is no foundation laid in the record as to the existence of any agreement.

[fol. 204] Examiner Robinson: We are trying to dig it out.

Mr. Giallorenzi: The witness has been—

Mr. Lippman: You are putting words in the witness' mouth.

Examiner Robinson: Let's not harangue about it.

I think you have got to get to the bottom of it. It may turn out to be nothing.

I think this goes to the very essence of your claim.

* * * * *

Q. Is there any agreement between you and Dover Banana Company for the use of your space aboard the Grace Line?

A. There is an oral understanding.

Examiner Robinson: We are getting somewhere.

When was it?

The Witness: From the first shipment, shipment No. 1, July 30, 1957.

Q. Is that agreement still in effect now, Mr. Consolo?

A. The understanding is still in effect, yes.

Q. With whom did you enter into that agreement on behalf of Dover Banana Company, Inc.?

A. With Charles P. Consolo, who is the President of Dover Banana Company.

* * * * *

Mr. Kharasch: Meanwhile, my request—

Examiner Robinson: Certainly?

Mr. Kharasch: (Continuing) —for a recess, during which I will publicly consult with my client.

Examiner Robinson: You go right ahead.

(A short recess was taken.)

Mr. Giallorenzi: What was the last question and the answer, if any?

(Reporter reads back the last question and answer.)

* * * * *

[fol. 305] Q. Will you tell us the terms of this agreement or understanding which was entered into between you and the Dover Banana Company, Inc.?

A. They would use the space, Dover Banana Company would use my space and buy bananas for one of my corporations.

Q. What consideration did you receive for the use of this space, Mr. Consolo?

A. Selling them bananas.

* * * * *

Q. Will you please tell us for whose account the bananas which arrived on the S.S. Santa Olivia were sold?

A. For the account of Dover Banana Company.

Q. Was the net proceeds of \$11,852.68 remitted to Dover Banana Company, Inc.?

A. That is correct.

Q. You testified that in consideration of your giving your space to Dover Banana Company, Inc.—

A. I didn't give it to him, I made them use it.

Q. —you testified that by you making them use it, they would buy bananas from your corporation?

A. That is correct.

Q. Which corporation is that?

A. That is an intermediary corporation.

Q. Intermediary corporation?

A. Yes.

Q. If that be so, why did R. Dixon & Co. show on Exhibit 24 that the bananas were sold for the Dover Banana Company rather than the intermediary corporation?

A. Because the intermediary corporation sells the bananas to Dover Banana Company in Guayaquil.

* * * * *

Q. What is the name of the intermediary?

A. Darien Refrigerated Shipping Company.

Q. Is that an Ecuadorian corporation?

A. No, sir, it is not.

Q. Do you know under the laws of what country or what state that company was formed?

A. Panama.

Q. Panama?

A. Yes.

[fol. 306] Q. Are you the principal or sole stockholder of that company, Mr. Consolo?

A. I am the majority stockholder of that company.

Q. Is your brother Charles Consolo associated with you in that company, Mr. Consolo?

A. No, he is not.

Q. Are you an officer of that company?

A. No.

Q. Are you a director of that company?

A. No, I am not.

Q. Are these bananas sold by your intermediary corporation to Dover Banana Company, Inc. before they are shipped on the Grace Line vessels?

A. They are sold to them F.O.B. Guayaquil.

* * * * *

Q. Referring to Exhibit 24—

A. Yes.

Q.—the fruit which was purchased from various growers—

* * * * *

Q. Was that fruit purchased by the Ecuador Fruit Company?

A. Yes, it was.

Q. For the account of this Panamanian corporation?

A. Correct.

Q. Then in turn the Panamanian corporation sold it to Dover, is that correct?

A. That is correct.

* * * * *

Q. —you testified that funds were remitted for the purpose of purchasing the fruit and meeting the other incidental expenses set forth therein?

A. Yes.

Q. And that there was also a bank expense of 74.52 sucres, is that right?

A. Yes, that's right.

Q. Did you personally remit those funds or did the Darien Corporation remit them?

A. Darien Refrigerated remitted this fund.

* * * * *

Q. The Ecuadorian Fruit Company, Incorporated, the fruit which they purchased in Ecuador?

A. Yes.

Q. —is that all for the account of Darien Refrigerated Company, Mr. Consolo?

A. Yes.

Mr. Giallorenzi: Thank you.

* * * * *

[fol. 307]

Hearing Room 705
November 11, 1958
45 Broadway
New York, N.Y.

(Mr. Consolo resumed his testimony.)

Examiner Robinson: Gentlemen, I'm ready whenever anybody else is. Have we decided where the witness will sit?

Cross examination.

By Mr. Giallorenzi:

Q. Now, you testified at the last hearing, I believe that you have three-fourths of the space of the No. 4 upper tween deck on the Grace Line vessel under a present contract. And that your brother, Charles Consolo, has one-quarter of the space?

A. Yes.

The Witness: That's on the freighters.

Q. And how many cubic feet would you say you and your brother have jointly?

A. I would say in the neighborhood of about 26,000.

Q. How many cubic feet would it take for each banana to load—

Q. Well, assuming you have an 80-pound stem?

A. I would say on an 80-pound stem you could load around 5,800 to 6,000 stems.

Q. And that prior to October, 1958, Turino gave up one-quarter of the No. 4 lower tween deck and that was taken

over by Mr. Pallis of Banana Distributors? Did you know, Mr. Consolo, that Swanee and El Morro and Lebantino and Turino were going to give up their space on the Grace Line vessels?

Mr. Kharasch: As of what time?

Q. Let us fix it as of October, 1958?

A. I did not know definitely, but there was talk about it. [fol. 308] Q. Did you know prior to October, '58 that there was talk about some of the Grace Line shippers giving up their space?

A. There was talk about it.

Q. Did you know when this talk commenced?

A. I don't know, I think I was called up from Miami to a meeting of all shippers on the Grace Line, the exact date I don't know, may have been in, I can't fix the date exactly.

Q. Well, did you attend that meeting or meetings of all the Grace Line shippers in 1958?

A. Well, I attended two meetings, that was all.

Q. Yes. Now, tell us and fix it as best you can when these two meetings were held?

A. I can't fix them, may have been in the spring of '58 I think, and then there was one in maybe, in the summer of '58, in that neighborhood.

* * * * *

Q. Did you ask Mr. Grossman what was the purpose of coming up to New York?

A. Well, there were several things discussed, several things. The question of reduced rates of the Grace Line, and the question of trying to get a minimum of freight weight for a certain period, the market was bad, a question of trying to get, some talk on the question of trying to get Standard Fruit on the ships and everybody giving up a little space to Standard Fruit, and things like that, nothing materialized, put it that way.

* * * * *

Q. Who was present at the first meeting in the spring of 1958, Mr. Consolo, to the best of your recollection?

A. Mr. Staff was there. Mr. Morey was there. Mr. I. B. Joselow was there. Mr. Lavilla and Indies Fruit Company. Mr. Lou Kurtz from the El Morro, I think that Mr. Parver, Mr. Lou Grossman, I was there, Mr. Consolo. There was an attorney Mr. Jack Friedlander was there, too, I don't remember this meeting whether there was Mr. Sawanee, Mr. Levitt, Bill Levitt, from Sawanee, I think he was at the second meeting, I don't remember whether Mr. Levitt was there. That's the best of my memory.
[fol. 309] Q. Was anybody there representing Naboa or Frutera?

A. Yes, Mr. Lovella was.

Q. And Naboa?

A. I don't think Naboa was there, I think Mr. Siminari second meeting.

Q. Did anybody keep an agenda of what was discussed?

A. I don't know, I think Mr. Staff was taking notes. I didn't keep an agenda, there was a general discussion, and everybody came up to listen to what everybody else had to say.

Q. What was the condition of the banana market then in the United States?

A. It was poor.

• • • • •

A. I think the market was poor, I think it started some time in January.

Q. Of 1958?

A. '58.

• • • • •

A. I think that meeting, I don't know whether the first or second meeting, trying to get together to submit a, I think the first meeting to appoint a committee to go to the Grace Line to try to reduce the freight rate, and try to get a waiver of the minimum load. I believe that was the purpose of the first meeting. If I remember correctly, we talked about many things, general conditions and Ecuador fruit wasn't arriving too good in the United States, large percentage of ripens. That was about the only things I remember of that meeting.

Q. So, in other words, at that meeting you do remember you discussed the condition of the fruit which was coming in bad and that the price of the bananas in New York was poor?

A. Well, something else was discussed, there was a plan, a discussion about trying to get a central selling organization, there were too many selling organizations on the same ship. In other words, R. Dixon was there, Joselow, Mr. Staff was selling bananas, and Banana Distributors was selling their fruit, I don't think that Naboa was in that picture, he was selling Morro's, and what's this other fellow, Martin Associates, and the Indies selling their own fruit and too many prices being quoted, over the same ship, trying to get a central organization if we could get a company to sell the fruit in the account of all of the importers.

* * * * *

[fol. 310] Q. Now, this committee, you testified to that was going to approach the Grace Line, for talks affecting the freight rates, do you know who it was, was any committee appointed?

A. I think there was, yes.

Q. Do you know who the gentlemen were?

A. Mr. Staff, Mr. Parvin and myself.

* * * * *

Q. Who went to the Grace Line?

A. Mr. Staff, Mr. Parvin, and myself.

* * * * *

Q. And did you ask him to reduce the minimum and make other requests?

A. Yes, we did.

* * * * *

Q. And that was requests that had been made you testified to because the fruit business was bad, the banana business was bad?

A. And the fruit wasn't coming in good quality, and that was it.

Q. Now then, you said you held a second meeting, which was in the summer, 1958, is that correct, Mr. Consolo?

A. That is correct.

Q. And did you appear at that meeting?

A. Yes, I did.

Q. What did you discuss at that second meeting?

A. Discussed at that second meeting, about the same thing, with the exception of trying to get each firm that exports bananas to the United States who had their own company in Ecuador to instruct the companies to try to get a stricter selection, better quality of fruit to come into the United States, and we had Mr. Siminari, I think, who was there, too, of the growers' association, to go to Ecuador and try to get a tax reduced, the export tax, and try to get the exchange reduced to a dollar, or seventy-five cents instead of \$1.20 or \$1.50, gives you more sucres on the open market and then Mr. Lovett, came up to propose that he would speak to the Standard Fruit Company, Standard Fruit Company wanted two or three chambers [fol. 311] on the Grace Line, if everybody would give up a little space in proportion, to give two or three chambers, there was some discussion about this, and about, I think, I made a statement I said I don't think we should talk to the Grace Line, I said that was a matter for the Grace Line. Later on I called up Mr. Wagner and asked him that if two or three chambers be given up from present shippers, would he give it to the Standard Fruit Company, directly, we didn't want another shipper in it, because there was no purpose in having another shipper in it, and he says he would not. He says anybody wants to give up their space let them write letters in requesting to be relieved of their contract. So I didn't pursue that any further when I knew from the head that the space would not be guaranteed to give to the Standard Fruit Company.

Q. Was there a request for a lower minimum on other conditions reviewed after the September meeting, or rather after the meeting in the summer of 1958?

A. I think Mr. Joselow said he was going to ask not for a reduction in rate, he was going to take the initiative, wanted to reduce the minimum and rather than ship 100 per cent minimum, ship 66 per cent, or 75 per cent, he was going to approach the Grace Line on that subject.

Q. Do you know whether he did that?

A. No, I do not.

Q. This request to reduce the minimum was because bananas were not as good as they had been?

A. I would say that was part of it, and the poor market in the States.

Q. A combination of both?

A. Yes.

Q. And the second meeting, other than discussing giving up this space in favor of Standard Fruit Company, did anybody else state he would give up his space?

A. Everybody talked about something. This was the banana business, we don't trust anybody. Put it that way. There was talk about Staff giving up a half a chamber, talk about Lovett giving up half a chamber, talk about me giving up a quarter of a chamber.

[fol. 312] Q. How about Pallis?

A. Everybody was mentioned in the discussion. About the space, that's not saying we would have carried out, just talk.

Q. But there was talk about giving up space?

A. That is correct.

Q. And that talk then became a fact when Sawanee and Lebantino and El Morro, Turino gave up space, Grayson also?

A. From their point of view, it was a fact they gave up.

Q. When did you first learn that they definitely were giving up space, that is, Sawanee and Grayson, Lebantino, El Morro, and Turino?

A. I learned about it after the Grace Line awarded this space to whoever received it from Naboa, West Indies, and I was kind of disturbed about it, I called up the Grace Line, told them the least they should have done was notify me that they had letters in their possession of certain

people giving up space, and offering me some of it. Whether I would have rejected it or not, that is something else.

Q. Did you confirm that conversation in writing?

A. No, I did not.

• • • • •

Q. Between the summer of 1958 when you had the second meeting and when the Grace Line gave this space to these different chaps or firms that people were intending, shippers were intending to give up space?

A. There was talk about it.

Q. There was talk about it?

A. Yes.

Q. Did that arouse your curiosity?

A. Yes.

Q. And did you feel it wise at that time to inquire of the Grace Line?

A. Yes, I did.

• • • • •

A. I asked after these conversations after this meeting I was always in contact with the Grace Line, I was always checking with them, I asked them if they had received these letters, in other words, there was talk of people going to give up, I asked, I think Charlie Nash, I don't remember [fol. 313] exactly, I spoke to both of them if they had received letters from shippers requesting to be released from their contract, and he says no, I haven't received a single letter yet.

• • • • •

Q. Now, did you inquire again of him?

A. The next time I inquired about him was after they were given out and I talked to him. At least, I should have been notified.

Q. Now, you knew, or you had some inkling they were going to give some space to speak about it?

A. Yes, there was talk about it.

Q. Did you request in writing that you be given space?

A. No, I did not in writing.

Q. Why not?

A. Because my contact with the Grace Line, I didn't think it necessary to write letters.

Q. If it was necessary for the others to write letters and you inquired why didn't you put yourself on record that you wanted space?

A. Because I was constantly in touch with them, I spoke to the Grace Line two or three times a week.

Q. And still you didn't think it necessary to write a letter requesting space, although you thought it was necessary for the other shippers?

A. No.

Q. Isn't it a fact—

Examiner Robinson: Just a minute.

Mr. Kharasch: Objection, arguing with the witness.

Q. Isn't it a fact at that time you didn't want any additional space and that is the reason why you did not put a request in writing?

A. It is not.

* * * * *

Q. Isn't it a fact that the reason you didn't request space in writing from Grace Line prior to October, 1958 was due solely to the fact that you did not need the space, did not want it?

A. That is not so.

* * * * *

[fol. 314] Q. Now, prior to July 20, 1958, do you know whether the Chilean Line went down the West Coast of South America?

A. Yes.

Q. And you knew that they had gone down that coast for quite some time?

A. Yes.

Q. Why didn't you request space prior to July 28, 1958 from the Chilean Line?

A. I think there was one time before that, I don't remember whether '57 or '56, I don't remember the year now, I went up to see Mr. Campion, at that time, and asked

him for his schedule, on the Chilean Line, and he couldn't give us a schedule every two weeks, it ran every eighteen days, every twenty days, and at that time the ships were stopping at Havana, this is, I'm quoting now what he told me, and that he couldn't guarantee an arrival date into the United States, maybe twelve, thirteen to fourteen—well, at those late days arrival, I was not interested in shipping bananas. Now I discussed it with him on this particular trip, the ship was not going to call—as a matter of fact, one ship before that, I was going to book, but that ship was going to call at Havana, and stop for forty-eight hours, he says, seventy-two hours, I says that ship I don't want, I says they have to guarantee there was going to be a schedule every two weeks, and some ships were not going to call Havana, come direct from Puna to Baltimore. I pick the Port of Baltimore, because he says it takes eight to nine mornings for arrival in New York, but he wanted to put a maximum of eleven days to cover himself in the contract, but the understanding was the ship was in Baltimore before the eleventh morning, eighth, ninth or tenth, and that is the reason why I went into this deal with the Chilean Line this time because of the arrival dates, in New York, and bananas were arriving in good condition eighth, ninth and tenth morning.

Q. Well then, your principal objection to the Chilean Line service prior to entering into these contracts, Exhibit 34, was that as a regular port of call on their northbound service they stopped at Havana for a period up to forty-eight hours?

A. Well, I didn't care how many days they stopped at [fol. 315] Havana, they got a right to stop at Havana, now, but I didn't want no maximum or eleventh morning in Baltimore arrival for the bananas.

Q. Well, I thought your testimony was that you were not interested in Chilean Line service prior to this date because they called at Havana, that you only became interested when they assured you they would omit the Havana call and they arrived in Baltimore a maximum of eleven days. Was that the conversation you had with Mr. Campion?

A. Yes, they still have a right if they want to put in a call into Havana, the contract doesn't state they have to come directly to Baltimore. They have a right to stop, but they cannot come any later than the eleventh morning to Baltimore, and he told me they are not going to stop at Havana and that the arrival date in Baltimore would be sooner than eleven days.

Q. When you say he, I assume you are referring to Mr. Campion?

A. Yes.

Q. If Mr. Campion told you that the vessels would not omit Havana as a port of call, would you have used them?

Examiner Robinson: Was that expressed in these contracts?

The Witness: Because it depends on what day he would arrive in the United States, what morning for the delivery of the bananas.

Q. Isn't it a fact it all depended on how long they stayed in the Port of Havana?

A. They have that call, they know what they have to load.

Examiner Robinson: What you are interested in is lapse of time for the ship to arrive for discharge?

The Witness: Yes.

Q. Do you know how long the Chilean Line vessels used to stay at Havana when they arrive there?

A. No, I do not.

Q. Do you know whether one day or five days?

A. No.

Q. Do you know whether any Chilean vessels have made a run from Guayaquil to New York, or Baltimore, including stop at Havana, in eleven or less days?

A. No, I don't know.

[fol. 316] Q. If the usual trip of the Chilean Line, stopping at Havana, which was a regular port of call on the northbound voyage was more than eleven days, would you have booked with them?

A. If it ran over to the twelfth morning delivery, as a regular schedule, I would not have booked them.

Q. When did you learn that the Chilean Line dropped the Havana line port?

A. Information from Captain Roza who sent me a schedule for the entire year after July of 1958 as to when the ships were going to call at Puna and when they were going to arrive at Baltimore, I have the whole year advance schedule.

Q. Is it your testimony that prior to July 20, 1958 you did not know they were going to drop that Havana port?

A. No, I did not. I couldn't, in July, maybe two weeks after that, when I spoke to them over the phone.

Q. You didn't know they were going to drop Havana?

A. He says one more ship going to call Havana and he said after that one, not going to call there.

Q. Well, isn't it a fact you called Mr. Campion when you learned that vessels were not going to stop at Havana?

A. No, I called him to find out what the schedule was going to be, on the Chilean Line, I did not know anything at the time that I spoke to Mr. Campion, or Mr. Slattery, Campion was on vacation.

Q. You spoke to Mr. Joseph Slattery?

A. I think that is it, and I spoke to Captain Roza.

Q. And Campion at that time when you first called was on vacation?

A. Yes, I believe he was on vacation.

Q. And you say at that time you did not know they were going to drop the Havana call?

A. No, I did not.

Q. Now, when you had made inquiries prior to this particular time in July, 1958 as to the number of days that the vessels would take to come from Guayaquil to New York, did you know how long they would take to make that run?

A. If it came directly to my knowledge?

[fol. 317] Q. No, if that vessel stopped at Havana?

A. No, I did not know, because they told me at that time they would not guarantee any tenth or eleventh morning arrival in New York, so at that time the ships just come

to New York, couldn't guarantee any tenth or eleventh New York arrival.

Q. Would you consider any vessels which stopped at a South American port northbound after loading bananas at Guayaquil, would you consider that service suitable?

A. Yes. The Grace Line does that, all their ships northbound.

Q. What ports do the Grace Line stop at?

A. To the best of my knowledge I think they stop at Buenaventura and this one, the name I spoke of, I think they call at two ports making the fishing date going southbound and picking up the fishing date coming northbound.

Q. How long did they stop at Buenaventura, the Grace Line vessels?

A. I don't know the exact time.

Q. Well, approximately?

A. They're supposed to claim twenty-four hours to thirty-six hours.

Q. To your knowledge, thirty-six hours?

A. No, in the contract, it says that.

* * * * *

Q. Well, the selling price would not be affected by dates of arrival, it would be affected by other circumstances?

A. That is correct.

* * * * *

Q. Did you consider making a bid for a part of the entire space a proper bid?

A. Did I consider it?

Q. Yes. For the entire space a proper bid?

A. I don't understand the question.

Q. Well, when you made this bid on March 6, 1957—

A. Yes.

Q. —did you consider bidding for the entire space with the exclusion of other shippers as a proper bid?

A. I only bid at the request of the Grancolombiana Line. If they had asked me to bid on one chamber, or offered me one chamber, or parts of a chamber, at a given figure, I would have responded to it.

* * * * *

Cross examination.

By Mr. Giallorenzi:

* * * * *

[fol. 318] Q. You testified that the entire No. 4 upper tween deck which is used by you and your brother on the contract, I don't know who it is used by on the contract, did carry at least 6,000 stems?

A. Depending on the size of the stems.

Q. Pardon me?

A. Depending on the size of the stems, about 57 to 63, that's depending on the size of the stems. I think that's about the figure.

* * * * *

LOUIS F. MEYER being first duly sworn testified as follows:

Direct examination.

By Mr. Lippmann:

* * * * *

Q. Let's see if we can clarify that a little bit, Mr. Meyer. Do the same customers look to you for bananas more frequently than once a week?

A. Oh, yes.

Q. Do they purchase from you more frequently than once a week?

A. That's right.

Q. These are the same customers?

A. That is right.

Q. If you were not able to, or if you had no bananas to sell them, would they have to go elsewhere for their requirements?

A. Definitely.

Q. From the standpoint of your ability to sell bananas, Mr. Meyer, would it make any difference whether the bananas arrived at Philadelphia, or New York?

A. No.

Q. From the standpoint of prices at which such bananas could be sold, would it make any difference whether they arrived at Philadelphia, or New York?

A. No.

Q. Has it been your experience that the market price for bananas in Philadelphia is the same, or approximates the prices realized in New York?

A. I believe they are the same.

* * * * *

[fol. 319] Q. At the present time, Mr. Meyer, can you sell for Mr. Consolo's account, up to an additional 14,000 stems a week?

A. Oh, yes.

Q. At what prices?

A. Well, at the market price.

Q. At all times since October 19, 1957 which, I believe, is the date of the first shipment you handled for Mr. Consolo—

A. (Interrupting) October 21st.

Q. October 21, 1957.

A. Yes.

Q. Could you have handled up to an additional 14,000 stems of bananas for Mr. Consolo's account?

A. Yes, I did prior to October 21st. The previous week I had 40,000.

Q. Could you have sold such bananas at the prevailing market prices?

A. That's right.

Q. Could you have also sold an additional 5,000 stems of bananas each week if such bananas had arrived at Philadelphia at all times since October 21, 1957?

A. Yes.

Q. At the same market prices which prevailed at New York?

A. Yes.

* * * * *

Cross examination.

By Mr. Giallorenzi:

Q. You testified, Mr. Meyer, that it really did not make any difference price-wise, or otherwise whether bananas came into New York, or Philadelphia, except that the local purchaser, or consumers of bananas in New York—

A. (Interrupting) They do.

Q. (Continuing) —would prefer—

A. (Interrupting) —they do prefer the local trade, do prefer.

MAXWELL BOYARSKY having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kharasch:

Q. Mr. Boyarsky, will you state your address for the record?

A. 1737 H Street, Northwest, Washington, D.C.

[fol. 320] Q. What is your occupation, Mr. Boyarsky?

A. Certified Public Accountant.

Q. How long have you been a Certified Public Accountant?

A. Approximately seven years.

Q. Is that in Washington?

A. In Washington, that's right.

Q. Are you regularly employed as a member of some company's staff, or are you independent?

A. No, I have an independent Certified Public Accountant firm.

Q. Are you a member of any professional societies?

A. Yes. I am a member of the American Institute of Certified Public Accountants. I am a member of the District of Columbia Society of Certified Public Accountants.

Q. Will you look at Exhibit 24 which has been identified as on Page 1 a loading sheet, for shipment No. 34, Santa Olivia, Page 2, an outturn sheet, and Page 3, liquidation sheet. Are you familiar with a long series of these documents?

A. Yes, I am.

Q. Let's turn our attention, please, to Mr. Friedlander's testimony as to unloading costs in Philadelphia. I would like to know, Mr. Boyarsky, how much per stem it costs to unload the 9,374 stems of Pan-Ecuador Company's fruit, and I want you to exclude from your computation, please, any costs which are already reflected on Page 3 of Exhibit 24. In other words, for example, if Mr. Friedlander provided us with a figure for weight, and you find on Page 3 of Exhibit 24, a figure for weighing which already appears, please exclude that cost in computing unloading costs per stem.

A. I made a computation based on the number of stems, and the shipment that Mr. Friedlander described, and the cost which Mr. Friedlander outlined. I arrived at a figure of 35.15 cents per stem.

* * * * *

Q. Mr. Boyarsky, let me read you the two sentences from the case of New Mexico ex rel. McLane v. Denver & Argo Co., 203 U.S. 381, or rather 203 U.S. 38.

* * * * *

[fol. 321] Q. I am about to quote, Mr. Boyarsky: "At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily the measure of damages in such cases is the difference between the value of the goods at the point of tender, and their value at their proposed destination, less the cost of carriage."

Question: Was that measure of damages the measuring stick for damages which you were asked to assume?

A. That is correct.

* * * * *

Hearing Room 818
November 13, 1958
45 Broadway
New York, N.Y.

Q. Let's turn to Exhibit 42, please. And before we go into the reasons for the various calculations, let's get in the record for each column exactly where the information comes from and how the figure was obtained. Now, on Exhibit 42, the column at the very far left is labeled "Index." What are those numbers?

A. These are numbers which I used to reference the various sailings as located on my summary sheet.

Q. They were simply assigned numbers serially to each of these sailings?

A. That's right.

Q. Now, the sailings, the voyage number and the ship names, which we see in columns 1 and 2, are ships of what carrier?

A. Grancolombiana Lines.

Q. And have you entered a voyage number and a ship name in chronological order?

A. That's right.

Q. For all Grancolombiana sailings?

A. That's correct.

Q. And the period is November 5, 1955, taking the sailing date from, let's say through September 1958—actually we have some figures for October.

A. We have some for October but we didn't have all the information on them. It runs through September 25, as far as having all the complete information.

[fol. 322] A. In column 10 I have the stevedoring taken at a 35% per stem charge applied to the number of stems shipped on the Grancolombiana sailing, which is shown in column 5 and then I multiplied column 5 by that 35¢ rate.

Q. Where did you get the 35¢ figure for preparation of this column?

A. I was given that figure. It was my understanding that the cost of stevedoring in Philadelphia was discussed with other people, and I felt that this would be approximate cost of stevedoring in Philadelphia.

Q. At the beginning of your testimony yesterday, I asked you to go through some of Mr. Friedlander's figures, and would you state again the computed stevedoring in Philadelphia?

A. Well, I took the figures that Mr. Friedlander had listed when he appeared at this hearing, and I came up with a figure of 35.15¢ per stem.

Q. Or quite close to your 35¢?

A. That's right.

.

Q. All right. Now, would you state again so we can proceed, how you computed column 10?

A. Column 10 is the total stevedoring cost at 35¢ per stem for the number of stems aboard the Grancolombiana vessel, which is shown in column 5.

Q. And how about column 11, Mr. Boyarsky?

A. Column 11 is the total stevedoring cost for the number of stems shipped on the Grancolombiana vessel at 48.8¢ per stem.

Q. And that 48.8¢ per stem represents what?

A. It's an actual Consolo expense in New York for stevedoring.

Q. At the twelve dollars and a half-cent per ton?

A. Twelve dollars and a half-cent per ton.

Q. So, as I understand, your columns 10 and 11 are alternate calculations at different assumptions of stevedoring?

A. That's right.

Q. Now, having had the benefit of hearing Mr. Friedlander, are you prepared to choose an actual rather than assumed stevedoring rate?

A. Well, on the basis of the figures detailed by Mr. Friedlander, I could use a 35.15¢ per stem cost instead of the figure in column 10 for the cost in Philadelphia.

[fol. 323] Q. Now, what appears in column 12, Mr. Boyarsky?

A. Column 12 shows the net profit at a 35¢ stevedoring cost and that figure would be column 9, which is the total profit before stevedoring and freight, which I described previously, less the freight paid to Grancolombiana as listed on the document which was submitted to me, and less the stevedoring which is shown in column 10 at my assumed rate of 35¢ per stem.

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By Mr. Giallorenzi:

Q. Well, now, tell us what instructions you received from Mr. Kharasch the first time you were retained in this matter?

A. Mr. Kharasch called me and said he would like to discuss a matter with me which would involve use of myself and my staff from the accounting point of view. I discussed with him the problem. He indicated to me that the problem was to ascertain what the amount of damages would be sustained by an individual based on certain information. He then presented to me the documents which I previously mentioned to you; the loading sheets; the outturn sheets; the liquidation sheets; the cards that you see here, the Grancolombiana cards, the other supplementary data which we discussed. He said this is the information which we have. "We are trying to determine what, if any, are or would be the damages sustained by Mr. Consolo as a result of having been refused shipping space on Grancolombiana ships." Now, with that preface, we then went into the documents, discussed the meaning of the documents. I posed certain questions to Mr. Kharasch; Mr. Lippman was in on the conferences; I posed certain questions to him. We talked about those points which were not clear or which needed additional clarification and then I sat down and set up preliminary worksheets to try to get at the information from the documents which I had. I discussed the setting up of the worksheets, which I have right here, with both Mr. Kharasch and Mr. Lippman. I want to emphasize that nobody told me what to do or how to go about this. I was given certain information. I was told of a problem and I was asked to use [fol. 324] my accounting ability to develop this information

in a clear mathematical manner, and that is what I tried to do.

Hearing Room 3553
New GAO Building
Washington, D.C.
Friday, November 21, 1958

JOSE J. BORRERO was recalled, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Borrero, you have been previously sworn in and you have testified that you are or have been the Acting General Manager of Transportadora Grancolombiana, LTDA., the General Agent in the United States of Flota Mercante Grancolombiana and that you are now the Executive Vice President of Grancolombiana, N.Y., Inc., which is the general agent in the United States and Canada for Flota Mercante; is that correct?

A. Yes, that is correct.

[fol. 330]

Hearing Room 4519
New GAO Building
Washington, D.C.
Tuesday, December 2, 1958

Mr. Rosenzweig: Before I begin with Mr. Friedlander, I would like to ask, Mr. Examiner, if you will take official notice of the Grace form contract which Grace employs in connection with the carriage of bananas for the shippers of bananas on the Grace Line, copies of which contracts are in accordance with the Board's order in the Grace Line's cases on file with the Board.

[fol. 331] Mr. Lippman: We already have in evidence, Mr. Rosenzweig, copy of the Consolo contract.

Mr. Rosenzweig: Yes. If you will just agree with me that the Consolo contract, except as to the terms of space and naturally the hire because of the difference in space, is the same as every other contract—

Mr. Lippman: I couldn't make that stipulation because I just don't know.

Mr. Blackwell: I was wondering, Mr. Rosenzweig, at what particular date would this official notice take effect?

Now, I am not sure that the order in the Grace Line case requires the carrier to submit every contract that it has ever entered with an individual shipper since the time of the decision and, as I understand it, some additional space has been allotted and contracts may have been changed, and those contracts may never have been filed with the Board.

Mr. Rosenzweig: I think the Board's order, Mr. Blackwell, requires the file or copy of each contract to be entered into with shippers.

Well, may I request then, that the Examiner take official notice of the contracts which are on file with the Board.

Mr. Blackwell: Fine.

Examiner Robinson: I think I can give you a little information on whether the newer contracts—you know, the people who got extended space, in this letter from Grace Line to the Secretary October 21, 1958, in which he states the names of the existing shippers who are no longer with him and the space has been given to others. It says:

"The additional space has been provided on the same basic terms and conditions as contained in the contracts heretofore filed with the Board. The new space allotments and operational factors has resulted in changes in vessel compartments provided certain shippers."

Mr. Blackwell: That takes care of my question.

Examiner Robinson: Why don't you just say the parties have no objection to letting me and the Board take cognizance of them? That will eliminate any question.

Mr. Dougherty: We certainly have no objection.

Mr. Lippman: No objection.

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[fol. 332]

BEFORE THE FEDERAL MARITIME BOARD

Transcript of Proceedings—(Excerpts)—May 9, 1960

Room 705

45 Broadway, New York, N.Y.

• • • • •
Mr. Giallorenzi: We are ready to proceed, Mr. Examiner.

• • • • •
Mr. Giallorenzi: Mr. Examiner, I would like to make a statement before any evidence is introduced.

• • • • •
(Mr. Giallorenzi:)

I therefore request that since the reparations period encompassed by the complaint and the supplemental complaint is from July 1955 to September 1951, that we have available at the time we intend to cross examine Mr. Consolo on the complaint the following documents for those years: the tax returns, profit-loss statements and balance sheets of Mr. Consolo, the Dover Banana Company, which you recall was the shipper on the Grace Line freight which had been assigned to Mr. Consolo, Darien Shipping & Trading Company, which he admitted was a Panamanian corporation which purchased the fruit from Ecuador Fruit Company, an Ecuadorian company, because, as I recall, the testimony was that the chain of the transaction here was the Ecuador Fruit Company would buy in Ecuador and would sell it to the Darien Shipping and Panamanian Company, and then, Dock Banana, in which Mr. Consolo was a minority stockholder, stepped into the picture and took over his space. In addition to that, in 1957, when the space came up for renewal, Grancolumbia addressed Atlantic Fruit & Shipping Company, one of Mr. Consolo's corporations.

And since this is the time for which they are seeking to recover substantial sums from Grancolombiana, I would like to press with all the vigor that I have at my command, the request that those documents be made available to us.

Mr. Kharasch: Mr. Examiner, I would like to note one thing. At the last hearing, there was an explicit offer on the record to accommodate any Grancolombiana witness on the subject of reparations that was then available, both by [fol. 333] myself and by Mr. Kurrus who was then here.

As to the document, if you will give me two minutes, I will find in the record your explicit ruling on the same request made at the last hearing, and I think my comment might be a little more pointed if you will suspend for two minutes, and I will find it in the record.

Examiner Robinson: Go ahead.

Mr. Giallorenzi: Yes, Mr. Examiner, I did ask for the [profit and loss] statements on two occasions, and those statements for Mr. Consolo that you expressly denied my request for. But I am renewing it now, because at this particular time of the proceedings we are directly involved with reparations.

I do not think it is necessary for Mr. Kharasch to look through the record. I concede that you denied my request on two occasions, but despite that denial, I again press my request, because I feel that this is the proper time that we must see these documents in view of the enormity of the demands which they are making against Grancolombiana.

Examiner Robinson: Does anyone have any recollection? I frankly don't.

Did I give a specific reason for it, or did I give a categorical denial?

Mr. Giallorenzi: On my second request, you said, "I expressly deny it", pretty emphatically.

Examiner Robinson: Did I give any reasons for that?

Mr. Giallorenzi: No, just the denial.

Mr. Kharasch: There was a denial, as Mr. Dougherty points out, at Page 828 of the record, and there was some discussion ahead of it, which I haven't yet found. To refresh your recollection, Mr. Examiner, this identical demand arose when Mr. Boyarsky had put in his computations based on evidence of the cost of bananas in Ecuador and evidence of the sales price of bananas in the United States.

And, as we explained at some length in the previous portion of this hearing, we used records available to Mr. Consolo to show banana sales prices in the United States with which we were concerned on our theory of damages, showing [fol. 334] the difference of the market price in the United States and the market price in Ecuador, less freight and stevedoring charges on Grancolombiana—that is, our claim is based on Grancolombiana's exclusion.

The Grace Line profit or loss is completely immaterial because Grace Line freight is not involved. Grace Line stevedoring is not involved.

You will recall that when we had a purchase price for a certain date in Ecuador and the corresponding sales price for some ten or twelve days later in the United States, we used those evidences of the market and applied them to each Grancolombiana sale during the reparations period.

And when, for example, if we had a Grancolombiana sailing, let us say, on the 30th day of June, we look for the closest evidence of the purchase market in Ecuador and then we look also for the closest evidence of the selling market in New York, in order to establish what the damage would have been if bananas had been shipped, had been able to have shipped with Grancolombiana, as Mr. Consolo explained at that time.

I think we went around and around a couple of times on the argument. This is not a case against the Grace Line. The Grace Line figures are used as evidence of market and the personal financial data that Grancolombiana is seeking has absolutely nothing to do with the state of the market in Ecuador on the date of the shipment, or the state of the market in New York on the date of arrival.

* * * * *

Examiner Robinson: At the moment, I would just limit it to the method on which we already were proceeding, and I will think about this thing, and I don't want to prejudice you at all and I will give you plenty of time to get it if I finally decide to change my mind.

We will stick by the way we were going, but you are not going to be precluded, because I certainly think you are entitled to every consideration I can give you.

Mr. Giallorenzi: It is clear to my mind that you have deferred your ruling on my request. There is no ruling on the record?

Examiner Robinson: That is right. If I make up my mind later on, I will be glad to change it.

[fol. 335] MAX BOYARSKY was recalled as a witness and having been previously duly sworn was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Q. Mr. Boyarsky, Exhibit 110 is a list of Grancolombiana arrival dates, tons outturn, cost and cost per ton.

Were these figures supplied to you by Mr. Consolo through our office?

A. Yes, they were.

Q. Did you use the average figure of \$12.41 per ton, appearing at the bottom of the page, as a figure for stevedoring and computing damages in the exhibit itself?

A. That is correct.

Q. And in column (10), what figures do you show?

A. The total stevedoring at \$4.51 per stem—excuse me—at \$.451 per stem.

Q. Will you explain, please, where you obtained the figure of \$.451 per stem?

A. We calculated that on the basis of the average stevedoring cost per ton. We referred to Exhibit 110, which shows the calculation.

Q. And how did you refer it to tons and stems?

A. From the basis of a differentiation to arrive at cost per pound and apply that to the average weight per stem.

Mr. Giallorenzi: What did you use, short tons or long tons?

The Witness: Two thousand pounds for tons.

Q. Mr. Boyarsky, at the earlier hearing you prepared interest computations, which was marked as Exhibit 44.

Would you tell us whether you have made a similar computation for this hearing?

A. No, I have not.

Q. Why not?

A. Because I felt that that computation could be arrived at very quickly when I knew the exact dates which would be used, because I think this would continue to run on the damages until the date of settlement was arrived at.

[fol. 336] Q. In other words, the earlier interest exhibit is not much good to us, because it represents interest up to a date already passed?

A. That is right.

Q. Would it be a simple accounting job to compute the interest rate?

A. Yes, it would be a simple process.

Q. As soon as you have the date which is the cut-off date, you mean?

A. That is right.

* * * * *

Mr. Kharasch: Mr. Meyer, will you take the stand, please.

LOUIS F. MEYER was called as a witness, and having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Kharasch:

Q. Mr. Meyer, you testified at the last hearing in this case?

A. Yes.

Q. I would like to begin, while Mr. Boyarsky is still in the room, by placing before you a file which contains certain documents labeled "Cargo Out-Turn Sheets," and certain

documents that have been referred to as "Liquidation Sheets."

A. This is it.

Mr. Kharasch: Mr. Boyarsky, will you come a little closer to the stand, so you can see these documents as Mr. Meyer testifies.

By Mr. Kharasch:

Q. Mr. Meyer, were these out-turn sheets which I am showing you, covering voyages between October 21, 1957 and October 30, 1958, in this file, prepared by R. Dixon & Co.?

A. That is right.

Q. Were the liquidation sheets prepared by R. Dixon & Co.?

A. That is right.

Q. Do the out-turn sheets and the liquidation sheets accurately reflect the selling price received for this group of bananas?

A. That is right.

Q. Will you look through the entire file, on both sides, and see if you recognize all the documents as documents prepared by your company?

A. Yes. I will testify to that. That is correct.

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[fol. 337] SHILLO ADIR was called as a witness, and having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Mr. Kharasch: Mr. Boyarsky, will you again watch as I show these files to Mr. Adir.

Mr. Boyarsky: Yes.

By Mr. Kharasch:

Q. Mr. Adir, will you look at the cargo out-turn sheets for October 15, 1957 and earlier, also the liquidation sheets? Would you examine the file and state whether those out-turns and liquidations were prepared by your company?

A. That is correct. They were.

* * * * *

LOUIS F. MEYER resumed and testified further as follows:

Direct examination.

By Mr. Lippman:

Q. Mr. Meyer, you have previously testified in this proceeding, I believe in November of 1958?

A. That is right.

Q. Do you recall, sir?

A. Yes.

Q. And you testified at that time that your company, R. Dixon & Co., was acting as commission agent for the sale of the bananas imported by Mr. Consolo on the Grace Line, is that correct?

A. Correct.

* * * * *

Q. Now, during the period of November 1958 up to September of 1959, could you have sold for Mr. Consolo's account up to an additional ten to twelve thousand stems each week?

A. Definitely.

Q. And at what prices could that amount of bananas have been sold?

Mr. Giallorenzi: I object to this. This is very, very speculative, what prices they would be sold at, because certainly 12,500 additional stems in the market might mean a downward trend in the prices. It depends upon what the [fol. 338] other fruit companies were bringing in, what the conditions of the market itself was here, how many bananas were being exported by the other companies; and I don't

think that Mr. Meyer, with all his experience in the banana business, is that good a witness.

Examiner Robinson: You may cross examine him in due time and try to bring out any weaknesses which you hope to find. There is nothing wrong with the inquiry.

Examiner Robinson: You may answer the question.

The Witness: Repeat the question, please.

(The last question was read by the reporter.)

The Witness: The current market prices prevailing at that time.

Cross examination.

By Mr. Dougherty:

Q. What is your best recollection? Did you, from October 1957, send your liquidation statements to Dover Banana Company or to Philip R. Consolo?

A. I sent them to whomever the accountings were made. I think it is Dover Banana.

Q. You think it is Dover Banana?

A. That is right.

Q. You wouldn't want to verify that by going over all your statements?

A. I will if I have to. Why not? It's no secret about it.

Q. That is right. There is no secret about it.

A. There is not, not as far as I am concerned.

Q. So your best recollection is that all your statements were sent to Dover Banana Company?

A. That is right.

Q. How long have you been engaged in and acting as selling agent for Mr. Consolo or any of the companies that he or his brother may have controlled?

A. I think from October '57.

Examiner Robinson: '27?

The Witness: 1957—to July of 1959.

* * * * *

[fol. 339] By Mr. Dougherty:

Q. After July of 1959, did you sell any bananas for the Consolo Brothers or any of the companies which they controlled?

A. Yes.

Q. You are still selling bananas for them, is that right?

A. That is right.

Q. In other words, Mr. Consolo or his brother or any of the companies they have are customers of yours, is that correct, Mr. Meyer?

A. No. Banana Distributors, I think is handling Consolo's bananas. They had some arrangement, I think, with Mr. Noboa.

Q. Well, at the present time, do you participate in the sales as a commission agent of any of Consolo's bananas?

A. That is right.

Q. You do?

A. Yes.

Q. Do you sell them under the firm name of R. Dixon & Co.?

A. No; Continental Banana Company.

Q. Continental Banana Company?

A. That is a selling agency.

Q. Are you a shareholder of that company?

A. No.

Q. Are you an officer of that company?

A. Yes.

Q. So you participate financially in the sale of the Consolo bananas?

A. That is right.

Q. Now, you requested space from Grancolombiana, through your attorney, Mr. Susskind, isn't that right?

A. That is right.

Q. And did you receive any space from them?

A. I didn't follow that up. I didn't take the space.

Q. But you made a request for it?

A. That is right.

Q. Now, do you recall the time that you last testified at these hearings—I will withdraw that.

Do you know who else Continental Banana Company distributes for?

A. Yes.

Q. Will you please tell us?

A. Andes Fruit & Produce Company, Banana Distributors, and R. Dixon & Co.

Q. And R. Dixon & Co.?

A. That is right.

Q. Are you an importer now of bananas?

A. No.

[fol. 340] Q. You are still a commission merchant?

A. That is right.

Q. Continental sells for you?

A. That is right.

* * * * *

SHILLO ADIR resumed and testified further as follows:

Direct examination.

By Mr. Kharasch:

* * * * *

Q. Following the period of 1959, when National Banana, acting as agents for bananas shipped from Ecuador by Mr. Consolo, sold the bananas, what company then took over this business?

A. After National Banana?

Q. Yes, sir.

A. Continental Fruit Company.

Q. And Continental Fruit—would you just briefly describe what your connection is with them?

A. I am an officer and a stockholder of Continental Fruit.

What basically happened, there were three companies selling bananas of various shippers of the Grace and Chilean

Lines. These shippers were represented by Andes Fruit & Produce, others by R. Dixon, others by Banana Distributors, and in some cases, a shipper had two agents representing him.

Noboa had Andes Fruit distributing some of his fruit and Banana Distributors the balance, at that time, National Banana.

National Banana and Andes Fruit decided that it would be better, more efficient, to operate as one company. Therefore, Continental Fruit Company assumed the distribution for these three distributors in effect—actually two, because National Banana was already doing the work that had been done previously by Banana Distributors and R. Dixon.

So Continental Fruit began the sale of all the bananas on the Grace Line, except for one chamber, or three-quarters of one chamber that is sold by a company called West Indies.

All the bananas on the Chilean Line and all the bananas on the Grancolombiana Line.

[fol. 341] Q. That is subsequent—

A. That is after they started the shipments.

Q. Now, looking for example, at a sailing, which I believe is sailing 104, and looking at your liquidation sheet there, I see that—well, I see a gross sales figure which is broken down among Dover Banana and Banana Distributors and Noboa; is that right?

A. Yes.

Q. What does that indicate as to the way you are handling fruit?

A. These three companies are in a venture, insofar as the total bananas imported by these three companies on this particular liquidation are sold as one unit, are weighed as one unit, proceeds divided according to the percentage, and the percentages were based, if my memory is right, more or less on the cubic space held by the specific companies.

Mr. Giallorenzi: What is the date of that statement you are reading from?

The Witness: September 15, 1959.

Mr. Dougherty: And who are the joint venturers?

The Witness: This is Grace Line.

Mr. Dougherty: Who are the three shippers?

The Witness: Dover Banana Company, Noboa, and Banana Distributors.

By Mr. Kharasch:

Q. Now, do I understand that all of the bananas arrive, and all of the bananas are sold to the various customers—then the proceeds are split; is that right?

A. Yes. Continental did the selling, but not as distributors. The distributors, in turn, had clients; one, in turn, was Banana Distributors and [we] had vessels including the Grancolombiana Line, depending on space that the person was assigned.

Q. As to the selling price, you pool all the bananas?

A. All the proceeds of these 16,937 stems were pooled. The expenses against them are pooled. The net amount after payment of freight and stevedoring and commissions and a few other expenses were divided according to the percentage of this particular venture.

[fol. 342] Q. Do you find that this new method of selling had certain deficiencies or advantages over previous—

• • • • •

Mr. Dougherty: As I understand it, Continental Fruit Company began operations in 1959?

The Witness: That is right. And I said this fruit is sold by Continental.

Mr. Dougherty: How does that bear on the exhibits which go up to, but not beyond that date?

Mr. Kharasch: Continental started September 8th. This entry is September 15th.

• • • • •

By Mr. Kharasch:

Q. Would selling an additional 10,000 stems a week arriving in Philadelphia on Grancolombiana ships, in the period of October 1958 to October 1959, have affected the market price?

A. We have shown that the more bananas that are sold—we haven't reached the optimum yet—the better average per sale received, because you have strength [in the] trade. You trade as a large seller of bananas and they depend on you because they know you can reach large quantities. You are able to [deal with] the trade [and] you are [not] limited to small units as Continental. [Suppose] all you have is 250 cars a week and a large customer says, "I want 500 cars," so the more fruit you bring in or the more fruit you get for sale, the better and stronger you become as a selling agent.

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Hearing Room 705, 7th Floor
45 Broadway, New York, N.Y.
May 10, 1960—10:00 a.m.
.

PHILIP R. CONSOLO having been previously sworn, testified as follows:

Direct examination.

By Mr. Kharasch:

[fol. 343] Cross examination.

By Mr. Giallorenzi:

Q. That is all we are concerned with, the independents.

A. As far as the independents are concerned, I don't know of anyone who has sort of slacked off while the bad market has been here or has increased with the good market. There seems to be a very constant supply of bananas from Ecuador into the same market, [what it] amounts to, [to] the best of my knowledge, [is] that who[ever] has space in Grancolombiana or Grace Line, has to ship whether the market is good or bad. There may be some fluctuation in

the market when it is good or bad on independent ships doing spot business while the market is good.

Q. Who do you buy your bananas from now?

A. In which company are you referring to?

Q. I don't know how many companies you have. We will get to that later.

A. Right now I buy bananas on the Grace Line and the Grancolombiana Line from Mr. Noboa on my ships and I bought from my own office, Ecuador Fruit Company.

Q. Isn't it a fact that you had to buy your bananas, part of your shipments for Florida ports, because there were no other sources of supply available to you and that is why you have to buy from him?

A. That is incorrect.

Q. Are you sure about that?

A. Yes, sir.

Q. At our last hearing you had introduced into evidence or there was introduced into evidence as Exhibit 31 a contract with Plantaciones Ecuatorianas and signed on your behalf, Ecuador Fruit Company, by Mr. Nebel for 3,000 stems, is that correct?

A. I would have to look at it to refresh my mind.

Q. Here it is.

A. I think that is correct.

Q. In other words, you have firmly committed to you only 3,000 bananas, is that right?

A. You mean on the written contract?

Q. Yes.

A. That is correct.

[fol. 344] Q. You didn't know how much you would get on an unwritten contract because that depended upon the condition?

A. I wouldn't say that.

Q. Why not?

A. Because there was an availability of bananas in Ecuador and it was just the ability to go out and make contact with farmers or producers to meet whatever requirements you needed.

Q. You are sure that you could have met any reasonable requirements?

Mr. Kharasch: What do you mean by "reasonable requirements"?

By Mr. Giallorenzi:

Q. 12,500 stems a week.

A. I think we could have.

Q. Could you give us some of the names of the suppliers?

A. We go out in the open market when we need fruit and contact whoever has bananas to sell them.

Q. So again it depends upon whoever has bananas to sell them?

A. There never seems to be a shortage of bananas in Ecuador.

Q. In other words, it has been your experience that there has never been a shortage in bananas from or in Ecuador?

A. We seem to get as much as we need. Recently we loaded as high as 60,000 stems in the south.

Q. That is quality bananas?

A. Yes, quality bananas sold in the market.

Q. Would you say the same conditions would apply in 1955, '56, '57 and '58? You could have loaded that many bananas, quality bananas?

A. I don't know. I can't answer that. I didn't try.

Q. You didn't try?

A. No. I didn't.

Q. When you were negotiating, at least so you say in your complaint, that space was denied to you from November 1955 from Grancolombiana, and you still didn't know whether you could obtain the bananas?

A. You asked me in amounts of 50,000. If you asked me in amounts of 5 or 10,000 or 15,000 or 20,000, I don't think we had any trouble in obtaining that amount of bananas.

Q. Did you have any written contracts then?

A. No.

Q. Do you recall the testimony of your employee, Mr. Nebel, who said that it is preferable to have written contracts?

A. Yes. It would be the easier course to have written contracts.

[fol. 345] Q. As I recall, you disagreed with him at the time. Do you still disagree with him?

A. Yes.

Q. He is still your manager?

A. Yes.

• • • • •
Cross examination (Continued).

By Mr. Giallorenzi:

• • • • •
Mr. Giallorenzi: There is a pending motion, Mr. Examiner, for the tax returns, credit slips and balance sheet of Mr. Consolo. We are anxious to get at the bottom of who, if any, was aggrieved to this action by Grancolombiana and it appears that all Mr. Consolo has done to this date, today, [was] write a letter and say, I want some space and I will pay you Y number of dollars. I think at this particular time we should be able to inquire as to the workings of this corporation and of these various corporations which he had. I think we also should be able to inquire as to what his income was during these years, how he obtained it and matters relating to that because we have two problems here, did he suffer the damages personally or were there some corporations that he controlled that would suffer these damages, and frankly I'd like to get at the bottom of it. I think that this line of inquiry is very, very relative.

Examiner Robinson: Under reparation proceedings, the only person of concern that I am interested in and the Board is interested in is the direct person involved; under the various interpretations of damages [by the] agency, I think Mr. Dougherty pointed that out quite vigorously in another proceeding.

• • • • •
Examiner Robinson: The only thing I can do is, you have the original figures here which shows what would have happened had he been able to ship by that means. But I don't

think we should go beyond Mr. Consolo. I know how you feel about it and I am sympathetic with you but as far as I am concerned, I don't think I can let you go beyond Mr. Consolo unless you show some fraud, of which there was no indication here, [unless it] was so obvious, I couldn't close my eyes to it.

[fol. 346] Mr. Dougherty: Mr. Examiner, are you saying we are not at liberty to inquire into Mr. Consolo's deals?

Examiner Robinson: You have inquired. He is the complainant. He makes the complaint. All I understand if I had the opportunity to use that space, I could have done it. What he does after that, as so frequently happens in these proceedings between Grace and Grancolombiana, there is a shifting of party shippers right and left. I could have shipped some bananas during that time. My damage would have been so and so. My profit would have been so and so. Now, whether or not he has proved that or anything, that is something else. I don't agree to going any farther than that.

Mr. Dougherty: We cannot then inquire into the operations of all of these corporations the evidence has shown are the ones involved.

Examiner Robinson: I don't think so, Mr. Dougherty, and you are not going to be too bad off even if I am wrong. I don't think I am wrong. I am trying to look at it from a long range point of view. Undoubtedly this thing will be decided by me on the reparation period long before the Court of Appeals in the District of Columbia decides on the merits of your case. In the meantime, you are not going to be prejudiced in the long run. It is the best I can do for you.

Mr. Giallorenzi: Just so that we will have the record clear. As I understand it then, your ruling is that we are not entitled to view and you are not directing Mr. Consolo to produce his personal income tax returns for the years 1955, 1956, 1957, 1958 and 1959?

Examiner Robinson: No.

Mr. Giallorenzi: Nor are you directing him to produce his profit and loss or balance sheets for the same years?

Examiner Robinson: I have been thinking along that ever since we talked about that yesterday. I would not grant that.

Mr. Giallorenzi: In other words, our requests for those three documents, income tax returns, profit and loss and balance sheets of Mr. Consolo personally from 1955 through 1959, are denied by you?

[fol. 347] Examiner Robinson: That's right.

• • • • •
By Mr. Giallorenzi:

Q. Now Mr. Consolo, referring to Exhibit 25 which deals with the request for space on Grancolombiana vessels. Did you at any time personally make any efforts to obtain bananas or did you make any efforts in connection with the projected shipments which you would have made on the Grancolombiana vessels, whether in 1955 or 1957, if your bid had been accepted?

A. All I did was correspond with Ecuador or Pacific Fruit Company, whatever the year may have been, and said, be on the alert, if we do get space, to secure additional 5 or 10 thousand stems of bananas; and he probably spoke to farmers or producers, Mr. Nebel. What he did, I don't know; and seemed to say there would be no problem to get an additional 5 or 10 thousand stems.

Q. Do you have those letters with you?

A. No. I don't.

Q. Do you recall any reply from him?

A. We have correspondence with Mr. Nebel. I don't know where that correspondence is now.

Q. Did you, at any time, actually tell Grancolombiana that you were prepared to tender shipments on their vessels?

A. No. I did not.

• • • • •

WILLIAM FANELLE having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Fanelle, by whom are you employed now?

A. Grancolombiana Incorporated, New York.

Q. And prior to being employed by Grancolombiana New York Inc., were you employed by Transportadora Limitada Columbia?

A. Yes.

Q. For how long a period of time were you employed by both Transportadora Limitada or Grancolombiana New York Inc.?

A. About 10 years.

Mr. Giallorenzi: Off the record.

(Discussion off the record at this point.)

* * * * *

[fol. 348] By Mr. Giallorenzi:

Q. Now, will you kindly describe to us what your functions or duties are in the chartering department of Grancolombiana New York Inc. and its predecessor?

A. Well, as a liner company we are always in the market for chartering of vessels and it is my duty to keep in touch with the market to see what vessels are available; also to see what vessels would suit us; check the market for cargos and start negotiations for any particular vessels or cargo which we might be interested in.

* * * * *

Q. Now, when you say you keep in touch with the market for the purpose of seeing what tonnage is available for Grancolombiana to charter, will you describe the method by which you keep in touch with the market?

A. Well, most brokerage houses, chartering brokers in most cases—I get a call from each chartering broker every day and every so often they put out a circular listing the

offerings of vessels on the market and with that of course we keep abreast of what the market is like. We get a market report every Monday as to the vessels which are fixed and every brokerage house as a rule, I call them brokerage house, actually it is chartering brokers—as a rule issue an offering list every day or every two days and so and with that—in other words, if the company decides they need various type of ship, I can go to my files and find out if there is a ship in that position, type of ship we want money-wise and so.

Q. How many brokers would you say you are in communication with on an average during the year, with reference to the chartering of tonnage?

A. During the year?

Q. Yes.

A. About 40 roughly. I can visualize my telephone list. I would say 40.

* * * * *

Q. Did you receive from 1955 on circulars from various chartering brokerage houses as to what reefer tonnage, if any, was available for charter?

A. Yes, sure.

* * * * *

[fol. 349] Q. Now, prior to coming here today, did I ask you to look through your records with reference to reefer tonnage and see what tonnage was being offered by owners for charter from 1955 on, about the center of 1955 on—limiting yourself to vessels about 50,000 cubic feet?

A. Yes, sir.

* * * * *

Q. Mr. Fanelle, referring to those records which you said comprise market reports received from various brokers and placed in this folder under your direction by your Secretary. Can you tell us as of 1955 on, summer or middle of 1955, what [reefer] vessels if any were available for charter, limiting your testimony to vessels about 50,000 cubic feet? I think you go from the middle of 1955 to October 1, 1959, that would cover the period. Give us the

dates when they are available and the name, if you have them and any other characteristics that may be there. Take your time in going through. I know you have a lot there.

A. Starting from or in June, did you say?

Q. Around that time, Mr. Fanelle. How far back do the records go?

A. December '55, November, October, August. Here we have some for June.

Q. Just give us the year and the amounts of cubic?

A. June 22, 1955—you said about 50,000?

Q. That's right, 50,000 or in that neighborhood.

A. How about 42,000?

Q. That's right.

A. You want the name of the ship?

Q. If you have it there.

A. The vessel Fedale, about 42,000 cubic feet, 13 knots.

Q. When was it available for hire?

A. September-October of that year; U.S. N.H., interested in three year charter. Do you want the ideas?

Q. No, just the material.

* * * * *

Q. Could you tell us whose circular that is?

A. Yes, Winchester.

Q. Is that a large recognized brokerage [house] in New York?

A. Yes.

* * * * *

Q. Then there is another ship with 31,783 cubic feet, 14 knot ship. She was opened in August or in September—ship called the Valfrede, for 6 to 12 months time charter. Vessel called the Casablanca; interested up to two to three [fol. 350] years time charter September. This was August 10th, date of circular.

Q. 1955?

A. That's right, sir.

Examiner Robinson: Of what capacity?

The Witness: 50,000.

By Mr. Giallorenzi:

Q. Anything about the speed?

A. 13 knots.

* * * * *

A. On November 9, 1955—the same vessel called Valfrede was still open for time charter. They don't give the length of time on there that they want it. They were interested in the delivery on the [other] side.

Mr. Giallorenzi: Off the record.

(Discussion off the record at this point.)

A. On November 16th, the Valfrede looking for business were open again with delivery Puerto Rico in January.

* * * * *

A. There were two on April 4th, two new buildings.

Q. What year?

A. April 4, 1956. There were two new buildings. The name of one is Iceberg and the other is Ice Flower, 41,000 cubic feet. They were ready on the Continent.

Q. Could you tell us when?

A. In the middle of '56 and end, respectively. They were new ships, new coming out of the yard.

Q. That is the cubic feet for each ship?

A. That is right, 41,187; speed was 12½ to 13 knots.

Q. Were they offered on a trip basis or time charter?

A. These would only be time charter in this particular case, only [the one] size; ready from yard Continent, middle and end '56, respectively. On May 16, 1956, the vessel Casablanca which I mentioned before—50,000 cubic feet, was open again June 7th, U. S. Atlantic; and ship called Kenidari—253 cubic feet, middle June, Chicago or U. S. Middle Atlantic.

Q. All time charters?

A. Yes, all time charters.

[fol. 351] Q. Do you have anything on the speed of those vessels?

A. No, sir.

Q. Go on.

A. On June 6th, the vessel Kenidari was still open for Great Lakes and U. S. Atlantic; and on June 6th, vessel called Josephine Lanasa—50,000 cubic feet, June 15th, U. S. Gulf or thereafter three weeks, time charter, voyage or sail. 84,000.

Q. Too big.

A. On June 11, the Josephine Lanasa was still open; on June 11th the Kenidari or the Casablanca were open in the Lakes again. On August 3rd, Josephine Lanasa was open in U. S. Gulf. On September 5th, vessel called the Burfin—about 50,000 cubic feet was open in U. S. Gulf for time charter or sale or voyages. October 24th, Berwermair open again.

Examiner Robinson: Let me ask you this.

Do those records show, this may sound like a stupid question because you are in the business all the time. Those figures you have read, are those the full capacity of those ships or just the reefer capacity?

The Witness: That would be the full capacity. This is what they call refrigerated tonnage. That is what they would be selling.

Examiner Robinson: I just want the record to show that there wasn't space for dry cargo.

The Witness: This is a full reefer ship.

By Mr. Giallorenzi:

Q. Those stock bananas or reefer fill?

A. Yes, sir. Incidentally, there are dry cargo ships which will show, for example, 200,000 cubic feet of bail space including 20,000 feet of reefer space.

* * * * *

Q. How about '57?

A. Shall I continue?

Q. Yes, go ahead.

A. 38,000 cubic feet.?

Q. Yes.

A. On March 13, 1957, Fisco—about 38,000 cubic feet was ready in the yard of South Finland in July of that year; interested voyages or time charter.

Q. What was the speed, Mr. Fanelle?

A. The vessel apparently was a new one being it was coming out of the yard, it doesn't give that. On April 17, 1957, there were several new buildings. They don't give [fol. 352] the names. They were each 30,000 cubic feet. First one ready May and then the others June and August; interested in long period time charter. Same date, ship called the Mezzada—63,000 cubic feet. That was offered for May of that year in U. S. Atlantic for time charter or voyages. The vessel called the Ice Princess—55,000 cubic feet, ready in July, interested in time charter. A new building that same year, 47,000 cubic feet, ready in European yard in December of that year, that was in '57. Five new buildings, each 45,000 cubic feet; first vessel was ready end of '57; the others during '58, interested time charter for minimum of two years; alternative, might sell one or two or all. May 8, 1957, new building, 47,000 cubic feet, ready for European yard in December. On June 12, 1957, the vessel called the Ice Princess, 55,000 cubic feet was again open on the Continent for July of that year. Also on June 12th, vessel called the Borgund—30,000 cubic feet was open in Eastern Canada for October of that year. August 7, 1957, vessel called Karitind—34,000 cubic feet was open in August for time charter.

And the vessel called the Keridra, 50,000 cubic feet, was open in August or September of that year in Chicago. He was interested in the direction of Continent for time charter. On September 13th, the vessel called the Kare, 47,000 cubic feet; vessel was open in Montevideo in October for 12 months time charter. On September 13th, the Consul Horn—30,000 cubic feet was open in November at Hamburg for time charter or voyage.

* * * * *

Q. All of the documents you have testified to are from Winchester or some other reputable brokers?

A. Yes. So far they are Winchester. I have others here.

Q. You didn't make any of those up yourself, did you?

A. No, sir. On December 26th, the vessel Kare was again open at Christobol for January or February of 1958.

Examiner Robinson: I wonder if we couldn't just shorten this by just getting an admission from Mr. Kharasch that there were vessels of this type available without any legal significance at all, just might save you the time.

[fol. 353] Mr. Kharasch: To the extent that Mr. Fanelle is testifying to as to reefer ships offered in Winchester circulars, I am sure he is reading them accurately; whether they are suitable for bananas or [whether would be] economically sound [to use them, I don't know.]

Examiner Robinson: I am not asking you to admit, I just want to know if they are circularized for charter.

Mr. Kharasch: Some of them are not suitable for bananas or economically feasible.

Examiner Robinson: I think [when] you come to cross-examine this gentleman, you [will find he] wouldn't know anything about it except this circular.

Mr. Kharasch: That is why I don't think it proves a thing.

Examiner Robinson: All he is doing now is they are saying there are refrigerated ships available.

Mr. Kharasch: I can certainly admit that he is reading from Winchester Circular.

Examiner Robinson: You go ahead, Mr. Fanelle, I tried.

Mr. Kharasch: I am not trying to be disagreeable. I don't know what it is you want to stipulate.

Mr. Lippman: Can we have a minute, please?

Examiner Robinson: Go ahead.

(Short recess.)

Mr. Kharasch: Mr. Lippman points out that we are perfectly willing to stipulate that these names and ships as being read by Mr. Fanelle was circularized by Winchester; that is really all.

* * * * *

The Witness: On August 23, apparently put out of line here, 1956, there is no name. The vessel has 50,000 cubic feet, open U. S. Gulf for one or two years time charter. Another one, 50,000 or rather 50,750 cubic feet, was open in the Continent for time charter. On August 22nd, 1957, a new building, 70,000 cubic feet was open in December of that year for time charter. September 10, 1957, the vessel called the Price Reefer—42,000—make that 42,500 cubic feet, was open in the end of that month. November 1958, [fol. 354] vessel of 59,500 cubic feet was open on the Continent for 12 months time charter. Another vessel of 42,000 cubic feet was open November of that year for time charter. Another one, November 19, 1958.

Mr. Kharasch: November 19, 1958, did you say?

The Witness: That's right, sir. A third vessel of 50,000 cubic feet was also open November for time charter. Another vessel of 48,000 cubic feet. This is all under the heading of November 19th and also opened in November for time charter. A vessel of about 61,000 cubic feet was open in December for time charter. Another vessel of 31,000 cubic feet was also open in December for time charter. Another vessel of 50,000 cubic feet was open in December for time charter.

Mr. Kharasch: You are not giving us the names because they don't appear?

The Witness: That's right. November 11, 1958, the vessel called the Tern—44,600 cubic feet was open in February of '59 for time charter. The vessel called the Frigore of 60,000 cubic feet was open end of November for time charter. The vessel called the Ice Flower of 38,000 cubic feet was open U. S. West Coast delivery this month, that would make it November.

By Mr. Giallorenzi:

Q. November of what year, Mr. Fanelle?

A. 1958.

Q. And the Frigore was also November 1958?

A. Yes. All these that I am reading are 1958. Under the same heading, Claus Horn—47,000 cubic feet was open

in November of that year. A vessel called the Steadt Schlesweig of 31,000 cubic feet was open in December for time charter. A vessel called the Dora Horn of 31,000 cubic feet was open in January of 1959. The vessel Kare of 45,000 cubic feet was again open in November of that year. A vessel called the Lakhish—of 50,000 cubic feet open in November of that year. The vessel Fidela—42,000 cubic feet was open early December of that year. There are some of these that look familiar but they don't have any name.

Q. Will you give us the cubic tonnage?

A. On August 13, 1958, a vessel of about 30,500 cubic feet was open beginning of September for time charter. [fol. 355] Mr. Kharasch: When you say that looks familiar, it might be a vessel that you have already named by name?

The Witness: That's right because of the position; that's the only thing. A vessel of about 50,000 cubic feet was open in September of that year. Two vessels of 60,000 cubic feet each were open in September. A vessel of about 30,000 cubic feet was open in October. March 5, 1959, a vessel of 31,000 cubic feet was open prompt, that would be first part of March for time charter. A vessel of 40,000 cubic feet was open March-April for time charter. Another vessel for 40,000 cubic feet was open in April. Another one with 40,000 cubic feet was open end of April. One with 45,750 cubic feet was also open end of April. A new building of 34,700 cubic feet was ready in the yard end of April of that year. A vessel of 63,000 cubic feet was open end of April for time charter.

Mr. Lippman: Also a new building?

The Witness: No, sir. A vessel of 60,800 cubic feet was open mid-May. A vessel of 52,000 cubic feet was open end of May. A vessel of 40,000 cubic feet was open end of June. On April 30, 1959—vessel called the Hildegard, 61,000—make that 61,800 cubic feet, a new building which opened in May of that year. On August 14, 1959, a vessel of 42,000 cubic feet was open prompt.

By Mr. Giallorenzi:

Q. Up to October 1st.

A. Alright. A vessel of 40,000—rather 40,200 cubic feet was open in August. A vessel of 40,000 cubic feet was open end of August. A vessel of 30,000 cubic feet was open in September. A vessel of 49,000 cubic feet was open in September. A vessel of 31,000 cubic feet was open in September. A vessel of 44,650 cubic feet was open in September. Another vessel of 30,040 cubic feet was open in September. A vessel of 51,500 cubic feet was open in September. A vessel of 57,000 cubic feet was open in September. A vessel of 51,000 cubic feet was open in October. A vessel of 35,000 cubic feet was open in October. A vessel of 59,000 cubic feet was open.

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[fol. 356] Cross examination.

By Mr. Kharasch:

Q. Mr. Fanelle, would you say again why you collected these various circulars?

Examiner Robinson: The answer probably is that he was requested.

The Witness: I don't collect them. I just keep them for reference.

By Mr. Kharasch:

Q. Why do you do that?

A. Just so I can know how the market fluctuates throughout the months and years.

Q. Has Grancolombiana chartered any reefer ships?

A. Not to my knowledge.

Q. Why are there letters in this file addressed to Grancolombiana from Chester, Blackburn and Roder, referring to telephone conversations and asking you for an offer? Have you called those people and asked them for an offer on a ship?

A. We probably had an interest from time to time in reefer vessels. I think you will also find some rough notes, copies of charter parties.

Q. In spite of all of the offers you got or all the offerings described in the Winchester circular, your company never chartered any ships?

A. Not to my knowledge.

Q. How many chartered ships of a speed of 13 knots would it take to provide weekly service between Philadelphia and Guayaquil?

A. I don't know.

Q. Do you know the equivalent freight rate, the freight rate per ton of reefer cargo which the charter price on any of these ships would have been equivalent to?

A. No.

Q. Do you know in fact whether these ships were fitted for bananas or suitable to carry bananas?

A. According to the circulars, I would say yes.

Q. Is it not true that your circular on one or two occasions explicitly stated that they were fitted for bananas?

A. That's right.

Q. And on many occasions they did not?

A. That's right.

[fol. 357] Q. Do you know whether or not these ships were fitted with blowers to carry bananas?

Examiner Robinson: Did you say "blowers"?

Mr. Kharasch: Yes.

The Witness: No. I don't.

By Mr. Kharasch:

Q. You just read tonnage of ships. Do you have any idea of the price of those ships?

A. There are some prices.

Q. Often there are not?

A. That's right.

Q. Do you know whether or not, you might be reporting the same ship, the same one described under a name and one time described just as a tonnage?

A. It is possible.

Q. There may be overlapping?

A. It is possible.

Q. Can you give me a general idea what a reefer ship with 50,000 cubic feet would carry?

A. I can't even guess that.

Examiner Robinson: Off the record.

(Discussion off the record at this point).

By Mr. Kharasch:

Q. Do you know as of any of the dates you have testified about, whether it would have been economically feasible to charter any or all of the ships you read and run a weekly service?

Mr. Giallorenzi: I object to that, Mr. Examiner. Mr. Fanelle is not in the banana business. He doesn't know what it cost from time to time.

Examiner Robinson: You can ask him that. If he says no, that is one way to find out the extent of his knowledge.

Mr. Giallorenzi: What is your answer?

The Witness: No. I wouldn't know.

By Mr. Kharasch:

Q. Is it true, Mr. Fanelle, that in this file are specific offers of ships to Grancolombiana?

A. Yes.

Q. It is a little more than just a circular?

A. That's right.

Q. And the Grancolombiana, are you perfectly clear, did not pick up any of those offers?

A. To my knowledge, no.

[fol. 358] Q. Are we agreed, Mr. Fanelle, as to most of the descri[ptions of] ships that you read, you do not know whether those ships were fitted for bananas or not?

Mr. Giallorenzi: If you know. If you don't know, say you don't know.

The Witness: I don't know, sir.

By Mr. Kharasch:

Q. Your answer is you don't know whether they were fitted for bananas or not?

A. That's right.

Q. Mr. Fanelle, is it also possible to ship non-refrigerated cargo on chartered ships?

Examiner Robinson: Do you mean reefer ships?

Mr. Kharasch: No. I am asking Mr. Fanelle now to compare the reefer situation with the non-reefer situation?

Examiner Robinson: That isn't what you said though.

By Mr. Kharasch:

Q. I beg your pardon. I will start all over again. Mr. Fanelle, is it possible for a shipper who has some ordinary dry cargo, let's say bags of coffee, to charter small ships to move coffee?

A. It is possible.

Mr. Giallorenzi: What do you mean by small ships, Mr. Kharasch?

By Mr. Kharasch:

Q. Would you agree, Mr. Fanelle, that ordinary cargo liner would have 500 to 700,000 cubic feet of space, an ordinary dry cargo [liner]?

A. I don't know what you or what ship you are talking about, sir. I can't answer that question.

Q. Please tell me about the Pasco or some of the Indias, the other ships?

A. Unfortunately, there I don't know anything about them. I can tell you nothing about our chartered ships.

Q. What is the capacity of a Liberty ship?

A. 484,000 cubic feet.

Q. And the C-2?

A. I don't know C-2's.

Q. Is it not true that a ship which can carry 50,000 cubic feet of cargo is about the tenth of the capacity of a Liberty ship or a C-2?

[fol. 359] Mr. Giallorenzi: I don't see the relevancy of this line of questioning.

Mr. Kharasch: I suppose I can make the argument perfectly well in the brief. I just wanted to demonstrate through this witness that you can say the same thing about any cargo or ordinary dry cargo on any ship.

Examiner Robinson: Why don't you just argue that then?

Mr. Kharasch: No further questions.

Redirect examination.

By Mr. Giallorenzi:

Q. Do you keep a record of tankers which are offered by brokers in New York?

A. Yes.

Q. Has Grancolombiana ever chartered a tanker?

A. No, sir.

Q. You keep the records nevertheless?

A. That's right.

Q. These offers which you have received from Winchester?

Examiner Robinson: What is the significance about tankers?

The Witness: The significance is why does he keep records of banana vessels if we don't—

Examiner Robinson: You are just trying to equalize all types of ships.

By Mr. Giallorenzi:

Q. Mr. Fanelle, these market reports which you get from Winchester and others [are] entitled, "Refrigerated tonnage open for charter," isn't that correct?

A. That's right.

• • • • •

ALBERTO SANCHEZ having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Captain Sanchez, will you briefly describe what your duties are with Flota Mercante Grancolombiana, S. A.?

A. I am the marine engineer and superintendent of the Flota Grancolombiana in New York.

* * * * *

Q. I would like, Mr. Examiner, you to take an official note of an affidavit of service which was executed by Pedro Fortesa on August 7, 1959, and filed with the Maritime Board, together with a [letter giving our] dated August 4, 1959 and specimen contracts dated September 1959, in connection with the Board order which compelled Grancolombiana to open up its space for numerous shippers. The other documents are not form contracts. Let's see what they are.

Mr. Kharasch: I'd be glad to stipulate these documents were filed with the Board as a result of the Board's order. I am not sure of the relevancy but I have no doubt of their authenticity. I never saw the certificate of service but I will be glad to stipulate that was filed if I may have a copy of it.

Mr. Giallorenzi: Yes, certainly. And [as to] these four documents, [may it] be deemed that they may be marked in evidence.

Examiner Robinson: Are you just making reference to them or marking them in evidence?

Mr. Giallorenzi: Make reference to.

Mr. Kharasch: They are [in the] Board files, I believe.

Examiner Robinson: That is why I asked that.

Mr. Giallorenzi: And I also might point out various executed items in the addenda thereto are also in the files.

Mr. Dougherty: Will you consider them in evidence for our reference?

Mr. Kharasch: I will be glad to stipulate to any documents you want to refer to in the Board files.

Mr. Dougherty: These are also filed with the Board.

Hearing Examiner: They are filed pursuant to the Board order.

Mr. Kharasch: No objection.

Mr. Giallorenzi: What is the ruling, Your Honor?

Hearing Examiner: We will just refer to them.

* * * * *

[fol. 361] (The Contract referred to above is as follows:)

This Agreement made and entered into this — day of September, 1959, by and between Flota Mercante Grancolombiana, S. A., a corporation organized and existing under and by virtue of the laws of the Republic of Colombia, hereinafter referred to as "FLOTA", and hereinafter referred to as the "SHIPPER".

* * * * *

3. Freight shall be computed and paid at the rate of \$34.00 US currency per ton of 2,000 pounds based on total outturn weights. The shipper guarantees with respect to each vessel for the use of the refrigerated space specified in Paragraph 1 hereof, a minimum payment of freight to Flota at the rate of \$0.318 US currency per cubic foot of space made available to the Shipper, assessed on the 90% of the space allocated to the Shipper, whether or not the space is used; such minimum freight payment per type of vessel is as follows:

Name of Vessel	Cubic Al- located	90% Guarantee	Rate	Total
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Such minimum freight is to be paid by the Shipper in New York, N. Y. to Grancolombiana (New York) Inc., 79 Pine Street, New York, N. Y., within forty-eight hours after the vessel has reported for loading. Certified outturn weight certificates are to be furnished by the Shipper to Flota in

New York within one week after discharge of each vessel, and any additional freight charges over and above the minimum freight payment are to be remitted by the Shipper to Flota in New York within forty-eight hours after date of billing.

In the event that vessel or cargo is lost after reporting for loading and certified outturn weight certificates are not available, freight will be paid on the basis of the certified outturn weight certificate of the last banana shipment of the Shipper carried by Flota preceding such loss of vessel or cargo, or on the basis of the minimum freight payment required herein, whichever is greater. Full freight [fol. 362] shall be considered completely earned by Flota after vessel's reporting for loading and Flota shall be entitled absolutely to all freight and to receive it under all circumstances whatsoever, ship and/or cargo lost and/or not lost, or the voyage changed, broken up, frustrated or abandoned or the bananas damaged.

* * * * *

Mr. Giallorenzi: I am simply trying or want to show the amount of space which was available on our ships. We took the October 1st date because that's the date when the various shippers went aboard the vessels. If you recall, Mr. Examiner, the attorney for Mr. Consolo picked the figure one-third out of the air and based all his calculations on the theory that in his opinion at least, there were three only qualified shippers and that therefore all of his damages were assessed or based on one-third of the net profit that he would have made on the Grancolombiana vessels. We propose to show through this witness that when it became an actuality and a number of shippers applied for the vessels, the amount of space which was granted to Mr. Consolo was far less than the one-third, and we therefore, argue with, I think, a great deal of logic that here we have an actual figure of X percentage which he was allotted.

* * * * *

[fol. 363]

Room 705
Federal Maritime Board
45 Broadway
New York, New York
Wednesday, May 11, 1960

.
HARALD SOLVANG having been first duly sworn by The
Examiner testified as follows:

Direct examination.

By Mr. Dougherty:

Q. Your name, please?

A. Harald Solvang.

Q. And your occupation?

A. Ship broker.

Q. How long have you been a ship broker, sir?

A. In this country, since 1953, December; in Norway,
since 1945, November.

.
Q. Are you employed?

A. Yes.

Q. By whom?

A. J. H. Winchester and Company.

.
Q. What is the business of J. H. Winchester?

A. Ship brokers and agents.

Q. Now, will you tell us, briefly, what is the function of
a ship broker?

A. Well, it works both ways. We get inquiries from char-
terers to find ships for either time charter or [for] car-
goes, and it works the other way. We might have [owners]
come to us asking to find employment for their ship.

Q. Do you get descriptions or specifications of the ves-
sels that are sought by charters or sought to be chartered
by owners?

A. Oh, we always keep records in the office on each ship on these cards here.

Q. Do you have a special department within the chartering department just for reefer ships?

A. Yes, I handle that.

Q. You always handle that?

A. I handled it since 1954—'54 or '55—'54.

[fol. 364] Q. Do you have a card for a vessel called FEDALLA— Spell it, please?

A. F-E-D-A-L-L-A; a Dutch flag built 1951.

Q. Now, in your opinion, is that vessel suitable for carriage of bananas?

A. Well, my basis, I know she has carried bananas.

Mr. Examiner: Do you know anything about the outturn of cargo, whether it was damaged in any way, or do you happen to know that?

The Witness: Nothing at all.

Q. Is there anything on your card to show that it's capable?

A. Well, I have on my card, bananas. She has four compartments each. Forced electrical ventilated, can go to minus 20 degrees centigrade, which is anything. They carry from frozen, deep frozen products, up to anything.

Q. Do you have a card for the vessel called VAL-FREDIE?

A. No, I remember the ship. I think she has been sold in the meantime. I don't know the new owners.

Q. Do you know anything of that vessel?

A. All I remember, it was an Italian ship, small ship, Italian ship.

Q. Do you remember in what trade she was employed?
 A. I think the Mediterranean trade.

Q. Do you have a card for a vessel called CASA-BLANCA?

A. Yes.

Q. What does your card show, concerning the vessel CASABLANCA?

A. You want me to read it all?

Q. Where pertinent parts you can characterize it.

A. Dutch flag built in 1951, 50,750 cubic feet, bale, 13. 13 and a half knots, 4 to 4 and a half tons of [oil], according to owners description; temperature down to minus 20 degrees centigrade. Banana fitted 4 holds. That's what I have.

[fol. 365] A. I know she has carried bananas.

Q. On the basis of the information of your knowledge of the vessel, is it your opinion that she is qualified to carry bananas?

A. Yes, I would say so. I don't know—I don't know exactly how all the cargoes come out. I'm sitting in New York, and the ships are in the Gulf. It's impossible for me to say how many cargoes. The ships are coming into the Gulf I'm sitting here in New York. The cargoes are in the Gulf, referring to your previous question. All I can say, the ships had carried bananas.

Q. She has carried bananas?

A. That I know.

Q. Do you have a card on a vessel called ICEBERG or ISBYRD? I don't know which.

A. ICEBERG, and ICE PRINCESS, and ICE FLOWER. ICEBERG was sold.

Q. Do you have any information or knowledge on the ICEBERG?

A. No, I never fixed the ship myself, so I don't know.

Mr. Examiner: Does your card tell anything on it?

The Witness: No, I don't have a card. It was sold and it's under a new name. I knew there was a ship like that, Norwegian ship.

Q. Do you know whether she ever carried bananas?

A. No, I don't.

Q. What information do you have on a vessel called ICE FLOWER?

A. ICE FLOWER, Norwegian, built in 1956, 40,000 cubic feet. 12 knots on 4 tons, temperature down to minus 20 degrees centigrade, 2 holds, 3 hatches, 6 turrets.

Q. Do you have any information as to whether this vessel was fitted to carry bananas?

A. No, I don't know whether she had been— She has been sold.

• • • • •

Q. Do you have a card for a vessel called KENNING RAY?

A. Yes. Dutch flag, built in 1952, sister ship to the CASA- [fol. 366] BLANCA, as far as I know. The same cubic, 50,750, temperature down to minus 20 degrees centigrade.

• • • • •

Q. To your knowledge, has the KENNING RAY been employed in the banana trade?

A. Yes, she has.

Q. Do you have a card on a vessel called JOSEPH ELANSA or JOSEPHINE, I'm not certain as to whether I got that yesterday.

A. No, she has been sold, I think.

• • • • •

Q. Is it your opinion that the vessel of those characteristics could carry bananas?

A. Yes.

Mr. Lippman: He testified he didn't even know the characteristics. He said he had no knowledge. How can he testify?

A. Any ship can carry bananas.

Q. Did you offer this vessel as a banana carrier?

Mr. Examiner: I think I ought to inject something here myself. I won't take that statement literally, because we all know any ship can not carry bananas, in spite of what the witness says. Go ahead.

.

By Mr. Dougherty:

Q. Did you offer it as a refrigerated ship?

A. Yes.

Q. Do you have a card on a vessel called BURFIN?

A. No, not here.

Q. I beg your pardon?

A. Not here now. She was on my list.

Q. Yes.

A. It must have been sold. You know these ships change names all the time.

Q. Do you know the vessel?

A. I remember the name, that's all.

Q. Do you know whether it was fitted to carry bananas?

Mr. Lippman: He just testified that he [remembers] the name, that's all.

Mr. Examiner: I [sustain] that.

By Mr. Dougherty:

Q. I didn't hear that.

A. I just remember the names; she was a small ship. [fol. 367] That's all. I don't remember any more.

.

Q. Do you have a card on a vessel called FISCO?

A. Yes.

Q. Will you tell us what your card shows?

A. She's Finnish flog, built in 1957, about 40,200 cubic feet, about 11 and a half knots, and Lloyds, temperature down to minus 20 degree centigrade; able to maintain different temperatures 4 holds, 4 hatches.

Q. Is it your opinion that this vessel FISCO could carry bananas?

Mr. Lippman: Objection.

Mr. Examiner: Is there anything on your card to show she has carried bananas?

The Witness: No.

Q. Do you know anything about it, to your own personal knowledge? Has she ever carried bananas?

A. No.

* * * * *

Mr. Examiner: If he can demonstrate to me by any line of questioning that he knows, actually, this ship can carry bananas, you, personally, I can put it in.

Mr. Dougherty: I don't think it's necessary to go that far.

Mr. Examiner: Simply because a ship has refrigeration, doesn't necessarily mean that she is fitted properly to carry bananas. She may or may not be, and that's why I say if he wants to add anything to show, if he has any particular reason, by all means do it.

* * * * *

Mr. Examiner: You can't overlook the fact that these blower fans remove the gas and that's the point that concerns me. If this gentleman knows, he certainly can answer you. Go ahead and pursue the question. [Mr. Giallorenzi] I guess he is undoubtedly a qualified expert in refrigerating. He has been in this business many years. There are very few that have this verbal knowledge, and certainly in my opinion, [he] is eminently qualified to testify. [Mr. Robinson,] I tell you what I'll do. I will let him answer the question, and later on if, on cross-examination, it's been brought out that he is not in a position to, then we [fol. 368] will pass on it. In the meantime go ahead.

* * * * *

By Mr. Dougherty:

Q. Do you remember a card on a vessel called MASSADAN or MAGADAN?

A. MAGADAN, yes. Danish flag, built in 1956, about 62,000 cubic feet, about 12 and a half knots on 7 to 8 tons—Lloyds—can go down to 26 degrees centigrade.

Q. Now, is it your opinion, based on your experience and the information that you have about that vessel, that she can carry bananas?

A. Yes.

• • • • •

Q. But that would not appear on your card?

A. No, that would be on the list that I sent out.

Q. I see. Did I ask you about a vessel called ICE PRINCESS?

A. Yes.

Q. Or ICE FLOWER?

Mr. Examiner: I don't think you did. You said ICE-BERG and ICE FLOWER, but not ICE PRINCESS.

The Witness: That's right.

Q. Are these ice vessels generally of the same class, to your knowledge?

A. Yes, several of them are sister ships.

Q. And do they generally have the same characteristics?

A. They are. I think there are only two built of 40,000 feet and two of 60,000 feet. In other words, each of the two were sister ships.

Q. What do you have on the vessel ICE PRINCESS, if anything?

A. Norwegian, built 1957, about 60,000 cubic feet, about 13 knots, and about 5 tons of oil. Temperature down to minus 20 degrees centigrade, minus 40 degrees fahrenheit, 5 compartments; 3 were different temperatures.

Q. Again, sir, is it your opinion that this vessel could carry bananas?

A. Yes.

Q. And its sister ships?

A. Yes.

[fol. 369] Q. Do you have a vessel called BORGUND, approximately 30,000 cubic feet?

A. Yes. BORGUND, Norwegian, built 1959, about 30,000 cubic feet, about 11 and a half knots.

Mr. Examiner: Is that a refrigerated ship?

A. But I know she is built for Norwegian fish trade, so she can freeze down to minus 20, I'm sure.

Q. In your opinion, could she also carry bananas?

A. Yes, in my opinion; yes.

Q. What information have you on a vessel called C-A-R-T-I-N-D? Maybe it begins with "C," I'm not sure.

* * * * *

A. Karringtand, is that what you want, K-A-R-R-I-N-G-T-A-N-D?

Q. Approximately 34,000 cubic feet?

A. Yes, 34,000, about 12 knots, Norwegian flag, down to minus 20 degrees centigrade.

Q. In your opinion, sir, is this vessel—can this vessel be used in carrying bananas?

A. Yes.

Q. Now, sir, what information have you on a vessel called K-E-R-I-T-R-A?

A. K-E-N-I-T-R-A, Dutch flag, built 1952, about 50,750 cubic feet. Here again sister ship, I think of the other two CASABLANCA. Yes, and one other one. About 12 and a half, 13 knots, and 4 to 4 and a half tons of oil. Temperature down to minus 20 degrees centigrade.

Q. And is this vessel also capable of carrying bananas?

A. Yes. This ship I know has carried bananas.

* * * * *

Q. Now, sir, what information have you on a vessel called CARE.

A. CARE, Swedish flag, built in 1955, about 45,770 cubic feet, about 11 knots on 4 tons gas oil, temperature in drop X minus, down to minus 15 degrees centigrade, otherwise down to 17 or 18 centigrade.

Q. Do you know this vessel?

A. Yes.

Q. Is it, in your opinion—is she capable of carrying bananas?

A. Yes.

[fol. 370] Q. Do you know whether she has carried bananas?

A. No, but I was negotiating her once for it.

Q. I beg your pardon?

A. I remember negotiating the ship once for bananas trade.

Q. Do you have any information about a vessel called CONSULHORN?

A. That's right. She is a German flag, built in 1957, about 30,774 cubic feet, about 11 knots on two and half tons gas oil. She is a sister ship to the THERASEHORN. Temperature from plus 11 degrees centigrade to minus 20 degrees centigrade can cool differently each hold. She has two holds, two hatches.

Q. In your opinion, is this vessel suitable for carrying bananas?

A. Yes.

Q. Do you know whether it has carried bananas?

A. I think she has. I know she has been running in the Western Hemisphere for a long time, but I'm not sure about it.

Q. The sister ship is the T-E-R-E-A-H-O-R-N?

A. T-H-E-R-E-S-E-H-O-R-N. It's about 15 ships like that.

Q. It's sister ship to the Theresehorn?

A. Yes.

Q. Do you know anything about that vessel?

A. No, I do not. I mean, I have a card. Is that what you mean?

Q. What do you have?

A. It's a sister ship, same details as on the Consulhorn.

Q. What are the details?

A. German, built 1957, about 30,774 cubic feet, about 11 knots, at two and a half tons of gas oil, sister ship to Consulhorn, temperature from 11 degrees down to minus 20 degrees centigrade. Can cool differently each hold. She has two holds.

Q. Are there other Horn ships, for example, KLAUS-HORN?

A. Yes.

Q. Do you know anything about these other Horn ships?

A. I know several—I have been trading on this side.

Q. As what, sir?

A. Some of them bananas, some of them in meat. Fruit, eggs, and anything.

[fol. 371] Q. Are you able to tell us which ones were carrying bananas?

A. I know partly some of them. KLAUSHORN, MAIRE-HORN, [are chartered to] Carribbean-Hamburg line in Miami. I know two or three others. I have it in the office, the names. I can't remember it here now. I know it was horn ships.

Q. Do you know whether they have been available for charter during this period of 1955, through October 1959?

A. Most of them are built, let us see now—KLAUS-HORN was built in '58. She was on the market. She was fixed right away for the banana trade. KONSULHORN was built in 1957. He built all these ships from '57 and onwards, '57, '58, '59 and he had some coming out this year.

Q. Is it your opinion, sir, that the horn vessels are suitable for carrying bananas?

A. As far as I know, they have been for a long time. Like I said before, I can't—I don't know how the bananas are coming in to the Gulf. I am sitting here in New York. I don't know what condition they are in.

Q. It's not part of your job to check the bananas?

A. No.

Q. How many of these Horn ships are there all told?

A. I would say about 15; I would say about 15.

Q. Are they all generally or of recent built?

A. Yes. As I said, '57, '58, '59, and this year.

Q. And do they all have generally the same characteristics as to refrigeration?

A. Yes. As to the refrigeration all of them seem to have the same. The sizes vary, though.

Q. Do you have any information on a vessel called PRINCE REEFER?

A. PRINCE REEFER, Norwegian flag, built in 1950, about 43,550 cubic feet, about 12 knots on 5 tons of oil,

temperature down to minus 20 degrees centigrade, 3 holds, 3 hatches.

Q. Is it your opinion, sir, that this vessel is suitable for carrying bananas?

A. Yes, I think so.

Q. Do you know whether she has carried bananas?

A. That I don't know.

* * * * *

[fol. 372] Q. What information have you on a vessel called TERN, approximately 44,610 cubic feet.

A. A British flag, built in 1953, about 44,610 cubic feet, about 10 and a half knots, and three and a quarter tons of gas oil. Temperature down to 5 degrees fahrenheit, which is minus 15 degrees centigrade, banana fitted.

Mr. Lippman: Can I ask a clarifying question here. You just said that the TERN was banana fitted. Does that information appear on your card?

The Witness: That's right.

By Mr. Dougherty:

Q. In the other instances when you have not said Banana fitted, that information does not appear on your card?

A. That's right.

Q. You have mentioned every instance where the term banana fitted does appear on your card?

Q. Yes.

* * * * *

Q. What information have you on a vessel called FRIGORA?

A. FRIGORA, Norwegian built, 1957, about 59,000 cubic feet, about 13 knots, and about 8 tons of gas oil, fully electrically ventilated, temperature down to minus 20 degrees centigrade, that's minus 40 degrees fahrenheit, 5 compartments, 5 separate temperatures, 75 air changes per hour, deck heights between 6 feet 5 inches and 8 feet 5 inches, two holds, banana fitted, 6 hydraulic derricks, 6 winches, and 6 derricks three tons.

Q. And is it your opinion, sir that that vessel is suited for carrying bananas?

A. Well, I know she is carrying, or she has been, and I still think she is carrying bananas.

Q. Now, sir, what information have you on a vessel named STATT SCHELSWIG, approximately 31,000 cubic feet?

A. STATT SCHELSWIG, sister ship to the DORA-HORN, about 31,000 cubic feet, about 11 knots on 3 tons of gas oil, German flag, built 1958, temperature from plus 11 degrees centigrade to minus 20 degrees centigrade. Highest class German—Lloyds—2 holds can pull differently [fol. 373] in each hold, 4 winches, 4 derricks, 2 hatches, and I have the size of the hatches. I guess you don't need that. I have some of the sizes, before, of the hatches, which I haven't read off. She's one of the Horn group ships.

Q. She is included in that group of about 15 Horn ships that we previously discussed?

A. That's right, yes.

.

Q. Do you have any information on a vessel named LAKHISH?

A. LAKHISH—Israel, built 1958, about 15,300 cubic feet, about 13 knots on 6 knots diesel oil. Temperature down to minus 20 degrees centigrade, banana fitted.

Q. Is it your opinion this vessel is suitable for the carriage of bananas?

A. Well, she has been in that trade for the last 10 to 12 months.

Q. Now sir, what information have you on a vessel named HILDEGARDE?

A. HILDEGARD, German flag, built 1958, about 61,800 cubic feet, gross about 57,000, cubic feet for bananas, about 12 knots and about 5 tons of gas oil, temperature from plus 12 degrees centigrade to minus 20 degrees centigrade, 60 air trays per hour, electrically ventilated, BBC refrigeration, 4 compartments, 2 holds can be differently in each hold, 4 winches, 4 derricks, 2 hatches.

Q. What would be your opinion as to whether that vessel is suitable for the carriage of bananas?

A. Well, she is in the banana trade now. She has been [redelivered] in the past month.

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Q. Now, bearing in mind this period of approximately November 1955 to October 1959, can you tell us whether there were any other vessels which, in your opinion, were suitable for the carriage of bananas, and which were available for charter?

A. You mean other than what was mentioned?

Q. Other than the ones we have mentioned by name.

A. I—

Q. Do you, for example, know of any new buildings during this period, or might I suggest that you might glance [fol. 374] through your card file, and limiting yourself to the range of approximately 30,000 to say 60,000 cubic feet, mention any other vessels of that type that were available during this period?

A. Well, that's very difficult for me to say when they were available. That's very hard for me to say. They were all on my list. They were all available.

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Mr. Examiner: This doesn't show the dates whether they are available anyway.

By Mr. Dougherty:

Q. Do you know, generally, any other new vessels which became available during that period?

Mr. Examiner: Again, Mr. Dougherty, as I understand him, his cards don't show what period they are available. He may just have them listed.

Mr. Dougherty: That is the reason for my last question, whether he knows generally, of his own knowledge, and independently of what his cards might show.

A. The only way I could check it is to see when they were built. Then they would be on the market. Here is

one I don't know whether it was on my list, CARRIBIA, Norwegian, built 1953, about 14,500 cubic feet, 12 to 13 knots on 4 tons diesel oil. And also another one, the AUARGA, about 35,000 cubic feet, 11 and 11 and a half knots on 3 tons gas oil, Dutch flag. I don't have notes when she was built.

Mr. Examiner: I think we are only wasting time unless this gentleman knows whether they are available at that time.

By Mr. Dougherty:

Q. Are these two you just mentioned you know it was available during that period?

A. I know the AUARGA, she was fixed [to] some South American [charterer], and the CARRIBIA is on the market on and off, employed on the Norwegian coastal trade. She's here once in awhile asking for business.

Q. What sort of business?

[fol. 375] A. Well, mostly she's out of business back to Europe, so she's coming over here for meat, and she wants to go back to Europe, and the fish for the season from Norway.

Mr. Dougherty: I have no further questions of this man.

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Cross examination.

By Mr. Kharasch:

Q. Have you offered [their] reefer ships through your circulars frequently?

A. Yes.

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Q. Have you ever been in the banana importing business?

A. No.

Q. Do you know how many days [ocean] travel [it] would take a 13 knot ship between Guayaquil and Philadelphia?

A. I don't know exactly.

Q. Do you know how many days of ocean travel under refrigeration bananas can stand before the cargoes spoil?

A. No.

Q. Are you familiar with the fact that bananas as they are ripening give off gas?

A. Yes.

Q. Do you know what that gas is?

A. No.

Q. Do you know what the effect is of leaving that gas in the holds where the bananas are?

A. I can imagine it's not so good.

Q. And what way do you imagine it would not be good?

A. I guess it would spoil the bananas; I don't know.

Q. Your cards contain no notations as to the price at which any of these ships were available, is that correct?

A. That's correct.

Q. Do you have any idea of the economic feasibility of chartering any one of the ships you named to go between Guayaquil and Philadelphia to carry bananas?

A. No.

Q. Would you say your answer out loud, please?

A. Pardon me.

Q. Would you give your answer out loud. The reporter doesn't get it when you shake your head.

Mr. Dougherty: The answer is no.

The Witness: No.

[fol. 376] By Mr. Kharasch:

Q. Can you tell us how much per ton of bananas carried to Philadelphia from Guayaquil would cost on each of the ships you named?

A. No.

Q. We are clear that in every case where a ship was indicated in your card file as being fitted for the carriage of bananas, you named that?

A. Yes.

Q. Are we also clear that whenever a ship had any special notation as to the ventilation system you also named that?

A. Yes.

Q. How many changes of air an hour are necessary in a ship carrying bananas?

A. I don't know.

Q. Do you know whether any of the ventilation systems you have described have draft forced air [exhaust]?

A. Forced ventilation, I know some of them have.

Q. Have you— If you had read into the record a note that the ship had forced ventilation, you assume from your records it had forced ventilation?

A. Yes.

Q. Otherwise do you know anything about the ventilation?

A. I know most of them have electrical ventilation. I presume it's forced; I don't know.

Q. Do you know anything about the capacity of the system, except as you have read some notes into the record?

A. No; only as appeared here on the cards.

Q. You said during your direct examination that any ship can carry bananas, and I assume, physically, that is true, you can put a banana on any ship in the world, can't we?

A. Not unless it's a [reefer] ship.

Q. Are there not banana trades, sir, in which bananas are carried not under refrigeration for a short distance?

Mr. Giallorenzi: I object to the question. I don't see the relevancy of it.

Mr. Kharasch: I am cross examining him because he has presumed to say that in his opinion, these ships are qualified to carry bananas.

[fol. 377] Mr. Giallorenzi: But they are refrigerated ships, not ships without refrigeration.

Mr. Examiner: His answer was, a while ago, that any ship can carry bananas, and that is why I objected to the question. We know that isn't actually true in most cases. It has other things to go along with it, and I think that is what Mr. Kharasch is trying to explore.

Q. What do you mean when you said any ship can carry bananas?

A. I was only talking about these ships.

Q. And it's your opinion that any refrigerated ship can carry bananas?

A. Not over 90 percent, I would say.

Q. And how much ventilation is required for a ship to carry bananas?

A. That I don't know, because no charters have asked me that question.

Q. Some of your [cards] do indicate how much ventilation there is, 60 [changes] of air an hour?

A. Yes.

Q. Some of your cards [do] not?

A. Yes.

Q. Most of your cards [do] not?

A. That's right.

Q. How long would it take to load any one of the ships you named in Guayaquil with a cargo of bananas?

A. Gee, I have no idea. I don't follow that.

Q. Do any of the ships you named have side ports?

A. No small ships have side ports.

Q. No small ships have side ports, is that right?

A. Well, I don't think any of these, as I can remember, have any side ports. Maybe, I think I had a couple; maybe I have.

Q. Do you know anything about the process of loading ships in Guayaquil or other Ecuador ports?

Mr. Giallorenzi: You mean loading ships with bananas?

Mr. Kharasch: Yes.

The Witness: I have heard they loaded—they carried stems over their backs, you know.

By Mr. Kharasch:

Q. And do they carry—the stevedores, the longshoremen, [fol. 378] carry stems over their backs to the side ports, do they not?

A. If they have side ports, maybe they do.

Q. You said as to a ship named CASABLANCA, that the ship was qualified to carry bananas, and it came into the Gulf with bananas?

A. Yes.

Q. Do you know if it ever came through the North Atlantic with bananas?

A. That I don't know.

Q. Did you fix the CASABLANCA?

A. Yes.

Q. To the North Atlantic?

A. No.

Q. Have you fixed the CASABLANCA at all?

A. Yes.

Q. In what trade?

A. Into the Gulf [from] Guayaquil.

Q. Have you fixed any of the other ships you named to the North Atlantic?

A. With bananas?

Q. Yes, for the banana trade.

A. No.

Q. Have you fixed any of the other ships you named with bananas to the Gulf?

A. The DOLENTIME charter.

Q. And that was to the Gulf?

A. Yes.

Q. And it was coming from Ecuador to the Gulf?

A. That's what I—I didn't follow each voyage.

Q. Is it a shorter voyage from Ecuador to the Gulf than Ecuador to the Atlantic?

Mr. Giallorenzi: Would you please specify the port in the Atlantic. There are many.

Mr. Kharasch: Philadelphia.

The Witness: I could check it here. I would say it's the same.

By Mr. Kharasch:

Q. Do not the ships come from the Panama Canal?

A. Yes.

Q. And also from the Panama Canal to New Orleans [or] to Philadelphia?

A. It's a shorter way to New Orleans.

Q. To get to Philadelphia, the ship has to [swing] around Florida to [come to] the Atlantic Coast; to get to New Orleans, it has to come [through] the Canal almost directly to New Orleans?

[fol. 379] A. I'm [often] surprised when I look at distances in the Gulf. I don't have anything to do with the distances.

Q. What did you mean when you said that a ship, the THERESEHORN, for example could carry from 11 degrees centigrade to minus 20 degrees centigrade? What is the significance of the [highest figure]?

A. The highest and the lowest temperature.

Q. It could not carry cargo higher than 11 degrees centigrade?

A. That's my understanding.

Q. Do you have that sort of range of temperature information on any ships except the ships where you gave us this range of temperature?

A. I didn't get you that. Do I have it for other ships?

Q. For the THERESEHORN you told us explicitly it could carry [from] 11 degrees centigrade, [to] minus 20 degrees.

A. All the Horn ships, because that's the way it was listed to me. Other ships only list the lowest temperature.

Q. What is the temperature [at] which bananas must [be carried] under refrigeration?

Mr. Giallorenzi: I object to that question, because the testimony has shown it's common knowledge that each and every banana shipper determines what temperature he wants to have his bananas carried, depending on the lengths of the voyage, the thickness of the skin of the bananas, and without that information I think that question is impossible to answer.

Mr. Examiner: I am sure he is going to answer he doesn't know, but that's no reason the question can't be propounded

to him, because Mr. Dougherty's questions all went to whether or not these particular ships were capable of carrying bananas, and that's only one of the ways he can find whether this gentleman knows. We know from the Grace Line, in your case, that those temperatures didn't vary too much, regardless of the thickness of the skins, and he may know, or may not know, but I think the question is certainly proper in all the circumstances.

A. Around 50 degrees, it might be my understanding.
[fol. 380] Q. Fifty degrees Fahrenheit?

A. Yes.

Q. You stated that the BORGUND was built for the fish trade?

A. I think so. Most of [the] small [reefers] are built for coastal trades.

Q. And what did you mean by the fish trade, frozen or refrigerated fish?

A. Frozen.

Q. From where to where was that?

A. Well, anywhere from Norway to United States, from Norway down to the Mediterranean, or from Iceland [to] Europe.

Q. You say most small ships were built for the coastal trade. Does that apply to most of the reefer ships that you named at this point?

A. Yes.

Q. This morning?

A. Yes.

Q. Does fish require frequent changes of air when it's carried under refrigeration?

A. That I don't know.

Q. You stated that the BORGUND, in your opinion, could carry bananas.

A. Yes.

Q. Does the BORGUND have banana fittings?

A. That I don't know.

Q. Does it have ventilation systems suitable to carry bananas?

Mr. Examiner: You can look at your cards if you want

to.
The Witness: There's nothing in the cards about that.

By Mr. Kharasch:

Q. Does it have a speed sufficient to engage in the Ecuador-United States-North Atlantic banana trade?

A. Well, I don't know, because I am no specialist, but I have—if it has bananas there, you keep it at a certain temperature. [Otherwise], it ripens quicker.

Q. Eleven and a half knots [is not] a very fast ship in modern terms?

A. About the average in small ships.

Q. How does that compare to large ships?

A. It varies from 14 up to 18 [on] the larger ships. The larger ships, the better the speed you can get than on smaller ships.

[fol. 381] Mr. Dougherty: Did you ever inspect the BORGUND?

The Witness: I think I fixed it once on a voyage going to Europe on the Mediterranean.

By Mr. Kharasch:

Q. Did you ever fix the BORGUND [in] a banana trade?

A. No.

Q. Let us take the MAGNADAN. Does that ship have banana fittings?

A. I think she has.

Q. Would you look at your cards and state whether it has banana fittings?

A. It doesn't say anything, because I haven't heard it was actually in the trade, but I know the owner very well. He has fittings that can carry anything.

Q. Do you know as to this specific ship, whether this specific ship has banana fittings on it?

A. No, I wouldn't.

Q. Do you know, as to this specific ship, what the ventilation system is?

A. No.

Q. Do you know, as to this specific ship, whether it was ever used from the Ecuador to the North Atlantic banana trade?

A. I don't know.

Q. Do you know whether this specific ship, whether it was available at a price which would make it economically feasible to put it in the banana trade?

A. I have no idea.

Q. In what trade has the KENITRA carried bananas?

A. From Ecuador, I think, into the Gulf.

Q. In what trade has the KARE carried bananas?

A. I don't know whether she ever carried bananas.

Q. In what trade has the ICE PRINCESS carried bananas?

A. I don't know whether she ever carried bananas.

Q. In what trade has the KLAUSHORN carried bananas?

A. As far as I know, Ecuador into the Gulf.

Q. I believe we are clear that you have no knowledge of the condition of the bananas discharged from any of the ships that have carried bananas into the Gulf.

A. I have seen ships discharging bananas into the Gulf, is that what you mean?

[fol. 382] Q. Did you not state on direct examination, that you can not say what the condition of the bananas was on out turn? Whether they had ripened on the voyage?

A. Well, I think it's shipped down to the Gulf, and I know the ship discharged bananas, as I saw the bananas there, but I don't know if they were good or bad. I don't know. I just saw the discharging operation.

Q. Have any of the ships you named been in the North Atlantic banana trade from Ecuador?

A. Not that I know.

Q. That couple of instances you told us the heights of the decks of some ships, did you have any other information about the other ships where you did not give the heights of the deck?

A. Not in my cards. I might have it in my plans in the office.

Q. Do you have any knowledge as to how high a hold must be to be suitable for bananas?

A. About 8 feet; that's the ideal height.

Q. I don't understand that—beyond that is not good, is that right?

A. That's my understanding.

Q. I want to be perfectly clear on this last point. All the ships you have named were brought to the attention of Grancolombiana, is that right?

A. Yes, and 50 other people.

Q. I am interested only in Grancolombiana. They were brought to their attention, to your circulars?

A. That's right.

Q. The man you dealt with was Mr. Finnelli?

A. Finnelli.

Q. And in no instance did Grancolombiana charter such a ship?

A. No.

Mr. Kharasch: No further questions.

Mr. Examiner: Mr. Dougherty?

Direct examination.

By Mr. Dougherty:

Q. The vessels we were just discussing, CASABLANCA, BORGUND, MAGNADAN, KENITRA, KARE, ICE PRINCESS and KLAUSHORN, could they have come to the North Atlantic?

A. They could have, sure.

Q. From Guayaquil?

A. Oh, yes.

[fol. 383] Q. They had a sufficient radius to make that trip?

A. Yes.

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Recross examination.

By Mr. Lippman:

Q. You said some of these ships could have come to the North Atlantic. Their radius was sufficient. By that you mean, if they carried enough oil or other fuel?

A. Yes.

Mr. Kharasch: Do you know what would have happened to the cargo of the bananas if they came to the North Atlantic?

Mr. Giallorenzi: I object to that. It's speculative, and it depends on the condition of the circumstances—the condition of the cargo at the time they were put aboard, and nobody in this room would hazard a guess.

Mr. Examiner: That's fundamentally true, but it's also no different a question as the one propounded on your side as to whether or not these ships were capable of carrying bananas, so he may or may not know the answer. So I'll permit him to answer the question if he knows.

The Witness: What happened to the cargo, is that the question.

By Mr. Lippman:

Q. Yes.

A. I don't know.

Q. Is your information regarding the refrigeration system of some of these ships, or any of these ships, sufficient for you to tell us how long it would take these—such refrigeration systems to reduce the temperature of the cargo from outside temperature in Ecuador to 50 or 52 degrees?

* * * * *

Q. And do you know whether there were any of these refrigeration systems, or how long it would take any of the refrigeration systems, on the ships you name, to bring the temperatures of the bananas [down from] let us say from 85 degrees?

A. No, I don't know.

Q. You said, on redirect examination that any of these ships could have come to the North Atlantic?

A. Yes.

[fol. 384] Q. To your knowledge, did any of the ships come to the North Atlantic?

A. Not that I know of.

Q. The charters of which you have any knowledge [were always to] the Gulf, is that right?

A. That's right.

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Q. You mentioned a ship called the TERN had a speed of 10 and a quarter knots.

A. Yes.

Q. Is that quite slow as ships go these days?

A. It's slow, yes.

Q. You have no information to offer us as to the charter terms on any of these ships?

A. You mean now, today, what the market is today?

Q. Not today, but during the period of testifying about from 1955 to October 1959, you said some of the ships were fixed. Do you know how much?

A. I have some records in my office. I would only be guessing. You want me to guess, I'll guess.

Q. I don't want you to guess. Do you know in particular as to the TERN, as to whether or not it arrived at Gulf ports with bananas which [had] ripened?

Mr. Giallorenzi: I object to that question.

Mr. Examiner: He already said several times he knows nothing about the out turn of any of these ships.

By Mr. Lippman:

Q. Can you give me a general idea, sir, of the crew aboard a reefer ship with 50 or 51,000 cubic feet?

A. How many crew members?

Q. Yes, sir.

A. I guess about 8 or 9, or so.

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JOSE J. BORRERO

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Direct examination.

By Mr. Dougherty:

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Q. Mr. Borrero, after the Grace Line decision I refer to, the one Mr. Robinson gave, that was affirmed by the Board, I believe, I don't know the Docket No.
[fol. 385] Mr. Giallorenzi: 771 and 775.

Mr. Dougherty: Thank you.

By Mr. Dougherty:

Q. Did you receive requests for space from various ship-pers?

A. Yes, we did.

Mr. Dougherty: I would like to have this document marked only for identification.

Mr. Examiner: 118 for identification.

(The document described above was marked Exhibit 118 for identification.)

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By Mr. Dougherty:

Q. Can you tell me, Mr. Borrero, how many [different] [names] are on those two sheets, and what are the [per-sons] or firms or corporations whose names are on those sheets?

A. What?

Q. How many different names are on those sheets?

A. Twenty-nine names.

Q. And in what connection did you make up that list, or what was the reason why that list was prepared?

A. Well, this was prepared, based on the letter of request that we received for space.

Q. In other words, the names on that list, the 29 names, constituted separate requests made for an allocation of space on the Grandcolombiana vessels, is that correct?

A. I would say so.

Q. Now, if the Board had directed Grandcolombiana at any time prior to the time when it actually did to open up the space, would Grandcolombiana have sent inquiries to those various persons on that list which inquired about the available space?

A. Yes, definitely.

Q. The same manner which it did in September 1959?

A. Same way.

Q. Would you have granted space on behalf—would Grandcolombiana grant space to each and every one of those [fol. 386] shippers if they had all applied, and you have found them to meet with the requirements which you laid down?

A. It had to.

Q. It had to?

A. Yes.

Q. Each and every one of the 29?

A. Each and every one of the 29—25 applicants.

Q. In other words, it could have been 15, or 10, or 2, is that right?

A. Definitely.

Q. If any number answered Grandcolombiana and requested it would have divided the space in accordance with their demands?

A. We were bound to it, don't you understand.

By Mr. Kharasch:

Q. Mr. Borrero, are Galland, Kharasch & Calkins, whose name appear on this list of 29 to which you sent letters, are they banana shippers?

Mr. Kharasch: Mr. Borrero said he had 29 different requests for space. I wish to know if names such as Galland, Kharasch and Calkins, which is the law firm which I am a member, David Suskind, whose name also appears here and [is a] lawyer in New York, I believe Richard Kurrus, who is a lawyer in Washington—that's all the lawyers I recognize offhand, are banana shippers or are they lawyers?

The Witness: I said that there were 29 names in those pages. I didn't say there were 29 shippers of bananas. Now, insofar as whether we sent a letter, we know whether the gentleman [had] requested [space] or not. I may say to you that if they were well known to [the] trade and [had made a request], they would [be sent a] contract for space on the Grandcolombiana.

By Mr. Kharasch:

Q. Well, I am asking you specifically about the lawyers names appearing on this list.

A. I don't know.

Q. Is there any reason that you sent a letter to my law [fol. 387] firm, except the fact that my law firm had written you regarding Philip R. Consolo's demand for space?

A. Well, we sent you a letter because you sent us a letter.

Q. And our letter was on behalf of Mr. Consolo, was it not?

A. Yes.

Mr. Examiner: Mr. Consolo's name appears on that list in addition to yourself?

Mr. Kharasch: It appears on the top of the list.

By Mr. Kharasch:

Q. And is there any reason that you sent a letter to Mr. Richard W. Kurrus, as he had written you a letter in behalf of banana distributors?

A. I sent a letter to Mr. Kurrus because he sent a letter in regard to space.

Q. On behalf of Banana Distributors?

A. It may have been.

Mr. Examiner: Is Banana [Distributors] listed separately, too?

Mr. Kharasch: Yes, it is.

Mr. Examiner: [As to] Mr. Suskind, does that show who he represents and whether or not they were also sent copies of the letter.

Mr. Kharasch: It shows that Mr. Suskind was sent a copy of the letter.

Mr. Examiner: Does his client's name appear on the letter also?

Mr. Kharasch: Yes, I believe so.

Mr. Giallorenzi: The client at that point was [R] Art Dixon and Company. The record shows all that.

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By Mr. Kharasch:

Q. Does this list of 29 people include people that applied for space from the Gulf, or had written to you about space for the Gulf?

A. The list includes everybody that [whose correspondence asked] space.

Q. That includes people that asked for space to the United States Gulf ports?

A. Yes.

[fol. 388] Q. How many of the names on this list were people that applied for space?

A. I don't know.

Q. To the United States Gulf ports?

A. I don't know how many, Mr. Kharasch.

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A. Most of them applied for the United States Atlantic Coast.

Q. How about Mr. Schuz?

A. I don't remember Mr. Schuz. I can't pinpoint any names. I may remember Mr. Consolo.

Q. [For] the Gulf port?

A. I think so, he applied for that, but there are letters [showing] everyone's request.

* * * * *

Q. Would you do that, please. I show you Exhibits 76 through 94, and ask you to look at the names of the shippers there, or people who were concerned there, and I ask you to tell me how many names appear on the list that is before you that are not on Exhibits 76 through 94? How many names appear on the list of 29 which were not people whose correspondence introduced in Exhibits 76 through 94?

A. Seventeen.

Q. Is the Grand Shipping Company related to the West Indian Fruit and Steamship Company?

A. I understand so.

Q. What about Cosa Calvet Martinez?

A. I don't know.

Q. You don't even have the address of the Cosa Calvet Martinez?

A. The name of the company, that's enough.

Q. How about Atlantic Banana Company and the West Indies Fruit and Steamship Company?

A. I don't know.

* * * * *

Q. Now, do you know if the address of the Atlantic Company is the same as the West Indies Fruit Company, did you notice that?

A. I noticed that.

Q. Are they associated?

A. That I don't know.

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[fol. 389] ALFRED A. CAMPION a witness, having been first duly sworn by the Hearing Examiner, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Campion, are you here pursuant to a subpoena served upon you in a proceeding entitled Philip R. Consolo v. Flota Mercante Grancolumbiana SA?

A. Yes, I am.

Q. At the present time what position do you hold with the Chilean Line?

A. Traffic manager.

Q. As traffic manager of the Chilean Line, tell us what your duties are.

A. My duties are booking of freight cargoes, scheduling of vessels, solicitation, almost every phase of cooperation that goes into dealing with customers or cargoes.

Q. Commencing with the year 1955, Mr. Campion, can you tell us the number of vessels, generally, with which the Chilean Line operated in the run which started in Valparaiso, I believe, and came to the North Atlantic ports?

A. Up to June, 1955, we had four C-2 vessels that had reefer space, approximately 29,000 cubic feet in each vessel. The speed of these vessels was about fifteen and one-half knots. In June, 1955, a new vessel entered the service and also had reefer space, a little more than the C-2's, I would say around 30,000 cubic feet, and in November of the same year another vessel entered the service. So, I would say, for the total of 1955 we had six reefer vessels in service.

The Examiner: What was the capacity of the last one reefer wise?

The Witness: The two new ones that came into service were sister ships with approximately 30,000 cubic feet each [fol. 390] available for bananas. The cubic capacity was larger but available for bananas, I would say, was about 30,000 cubic feet.

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Q. Again referring to June of 1955, and for the rest of the period during that year, can you tell us the number of days which it took your vessels to come to a North Atlantic port, either Philadelphia, Baltimore or New York after, let us say, having left Guayaquil?

The Witness: If they stopped in Guayaquil?

Mr. Giallorenzi: Yes.

A. If the vessel did not discharge basic cargo which it carried, iron ore or nitrate, in the South Atlantic ports, and came direct to New York, that length of time would be about eleven days; the vessel might have stopped at Havana before arriving in New York and after leaving the Panama Canal, at that time that voyage was about eleven days.

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By Mr. Giallorenzi:

Q. So that under ordinary conditions, in 1955, including a stop at Havana, you would make a trip to New York from Guayaquil, assuming you left Guayaquil, in eleven days?

A. Yes. We did have a contract for nitrate. There was an option as to whether the cargo could be discharged in the South Atlantic or in Europe because our vessels went to Europe after they discharged in New York.

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Q. If you had loaded in a South American port and discharged it in a South Atlantic port, how many days would elapse before the vessels arrived, let us say, at New York?

A. Roughly thirteen days.

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Q. Did you load any bananas for anyone in 1955, Mr. Campion?

A. Yes, we had a few shipments in the latter part of 1955.

Q. Do you know where those bananas were loaded?

A. They were loaded in Puna.

Q. Do you know when the first shipments began?

A. The first shipments began in July. I believe we had [fol. 391] five or six shipments and they ended in November when the Chilean fruit season began. That is the time that we did not call at Ecuador because we carried fruit from Chile.

Q. Just going back to Compania Sud-Americana de Vapores, is that a Chilean corporation?

A. Yes.

Q. During the Chilean fruit season is your reefer space used?

A. (Interposing) For the most part, yes.

Q. (Continuing) Is that used with Chilean fruits and melons?

A. Yes, right.

Q. Mr. Campion, can you tell us just about what period of time encompasses the Chilean fruit season?

A. Between December and May.

Q. During that period of time, naturally, you have to reserve your reefer space for the Chilean exporters, isn't that correct?

A. Correct.

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Q. Other than the six shipments of bananas in 1955, you had no other shipments of bananas in that year?

A. No.

Q. Do you know whether they were carried for one shipper under the contract or did you have various shippers?

A. There were two shippers involved.

Q. On the same ships or different ships?

A. Different ships.

Q. There was one shipper on each vessel?

A. Yes.

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Q. You have given us the cubic capacity of space available for bananas on the four C-2's and on the two vessels, the two sister ships, which came into service in 1955, the latter part of 1955. Can you describe to us the number of chambers available for bananas on your vessels?

A. Each vessel has four chambers.

• • • • •

Q. Looking at your records, can you tell us whether or not you solicited any banana business in 1955; by that I mean either telephone or written solicitation?

A. I might have telephoned, I don't recall; I don't have [fol. 392] any written memorandum on it.

Q. Do you know whether you received any request for space in 1955 from Philip R. Consolo?

A. I don't recall.

Q. If you had received any request from anybody in that year, would you have made a note of it, Mr. Campion?

A. I probably would, I generally do.

• • • • •

Q. Turning to 1956, Mr. Campion, you had six vessels fitted for reefer space in that year, is that correct?

A. Yes, that is correct.

Q. Those were the original four C-2's plus the two new ones?

A. Correct.

Q. Did you examine the records to see how long those vessels would take to come to New York?

A. In 1956?

Q. Yes.

A. The same as 1955, eleven days and thirteen days, depending on where the basic cargo was being discharged.

Q. That would be from Guayaquil?

A. Yes.

Q. Did the eleven days include the stop at Havana?

A. Correct.

Q. In 1955 the frequency of the service was twenty-one days, as I recall, is that correct?

A. Yes.

Q. In 1956 with the additional vessels, could you tell us whether the frequency of the Chilean Line service improved?

A. Yes, it improved. We had sailings from fourteen to sixteen days except every three months we had a chartered vessel which was not scheduled and the reefer space would then go to a period of twenty-eight days just for that one occurrence every three months.

Q. Other than the time when your reefer space was pre-empted for the Chilean fruit did you carry any bananas in 1956?

A. No, we carried no bananas at all in 1956.

Q. Did you solicit any banana cargoes in 1956?

A. My recollection is we did; we were working with one firm, Frank's Export & Import Company. We also solicited [fol. 393] [Andes] Fruit, Banana Distributors, Karl Suskind. Nothing materialized out of those inquiries.

Q. You say you solicited Banana Distributors; did you solicit them over the phone or in writing?

A. At that time I solicited them over the phone.

Q. Did you describe to Banana Distributors the type of service which the Chilean Line was offering?

A. Yes.

Q. Do you know who you spoke to at Banana Distributors in 1956?

A. There was a Mr. Adir.

Q. Do you know whether Mr. Consolo approached your company in 1956 or 1955 for space?

A. Not to my knowledge.

Q. Would the request have come to your attention as head of the traffic department?

A. Yes, I would say so.

Q. In 1957, Mr. Campion, how many vessels did you have in the same service that we have been talking about?

A. We had the same service, the same number of vessels, but the service changed to a certain extent.

Q. Can you tell us in what respect it changed?

A. We took two of the C-2 vessels and instead of sending them to Europe, after discharging in New York, we turned them around at New York whereby they loaded cargo in New York, Baltimore and Philadelphia and returned to South America.

Q. Did that change in the service, in that respect, increase the frequency of arrivals in the Port of New York?

A. No, it didn't increase the frequency of arrivals, no.

* * * * *

Q. During 1957, did the Chilean Line carry bananas for anyone?

A. No, no bananas at all were carried that year.

Q. Did you solicit the trade?

A. Yes, we sent out letters to people who we thought might be interested in space.

Q. Can you tell us from looking at your files where, when [fol. 394] and to whom you sent out letters for banana space in 1957?

A. In April, 1957, we sent letters to El Morro Fruit Distributors, Inc., 99 Hudson Street; Frank Export Import Corporation, 100 West 31st Street; Banana Distributors, 30 Vesey Street; [Andes] Fruit and Produce Corporation, 19 Rector Street; William Torrino, 130 Park Place. I guess that is it.

* * * * *

Q. Did you meet Mr. Consolo in 1957 at any time?

A. Yes, I recollect Mr. Consolo came to my office with Mr. Adir and that was the first time I got the impression that Banana Distributors was representing Mr. Consolo. I don't believe I met Mr. Consolo before that time.

Q. You do not recall meeting him prior to 1957?

A. No; I never got the connection, I might have spoken to him on the telephone.

Q. Do you know when in 1957 Mr. Adir visited you together with Mr. Consolo?

A. It is hard to say, I don't recall.

Q. But you do recall meeting him in your office?

A. Yes; I recall they came in to see me and I explained our service to them and I recall that Mr. Consolo was interested primarily in getting regular space all the year round which, of course, we couldn't offer. That was about the main point that I recall, more or less.

Q. Did you discuss rates, frequency of service, did you describe that?

A. Oh, yes, I did.

Q. Did Mr. Consolo tell you at that time whether Mr. Adir or Banana Distributors was his agent?

A. I don't recall but I assumed that considering that they both came in together.

Q. After this inquiry of space from Mr. Consolo in 1957, did you enter into any agreement with him for the carriage of bananas during the year?

A. 1957?

Q. Yes.

A. No.

Q. Did you hear anything further from him in 1957?

A. No, I don't believe I did.

Q. Your best recollection is that you met him once sometime in 1957 and you described the services to him?

A. Yes.

* * * * *

[fol. 395] A. (Continuing) I believe I was too hasty in answering the latter part of your question. I see here that we made a tentative booking to Banana Distributors for the SS ANDELEAN.

Q. When was that, Mr. Champion?

A. That was June 13, 1957.

Q. Do you know whether that tentative booking which you made for the SS ANDELEAN on June 13, 1957, with Banana Distributors, was that before or after Mr. Consolo met with you in 1957, your best recollection?

A. My best recollection now is that it was after.

Q. It was after?

A. Yes. Incidentally, this shipment, according to my records, never materialized.

Q. That agreement that you had, was that for one voyage only?

A. Yes.

* * * * *

Q. In 1958, Mr. Campion, will you please describe the Chilean Line service; that is the number of vessels involved, the frequency of the service and how long it took to come to New York; that is in 1958?

A. In 1958 the service was again changed whereby the vessels came from South America and they discharged and loaded at Baltimore, Philadelphia and New York. They did not stop at Havana nor did they go to Europe. On that basis it gave us a frequency of about fourteen days' service.

Q. Assuming these vessels with reefer capacity had loaded bananas in Guayaquil, how long would it have taken them to come to either Baltimore, Philadelphia or New York?

A. We estimated nine days.

* * * * *

Q. In 1958, did you carry any bananas?

A. Yes, we did.

Q. Did you enter into any agreements with Mr. Consolo?

A. Yes. We carried four or five shipments for Mr. Consolo.

* * * * *

Q. During the remainder of 1958, Mr. Campion, did Mr. Consolo request any additional space from the Chilean Line?

A. Yes, he was interested in some agreement whereby he could contract the space.

[fol. 396] Q. Was that in 1958?

A. Yes, while we were carrying his cargo.

Q. He spoke to you about entering into an agreement?

A. Yes.

Q. Did you discuss with him the terms of the agreement or anything of that sort?

A. No, because we had to clear that up with our principals first.

Q. Did he tell you how long an agreement he wanted?

A. He spoke in terms of eighteen months or two years.

Q. Did he ask you for all or part of the refrigerated space?

A. He asked for at least part of it and if possible all of it.

Q. Did you talk terms with him?

A. We indicated general terms, yes.

Q. Such as freight rates and things like that?

A. Yes.

Q. Did you come to any agreement with him in 1958 as to a booking arrangement with him?

A. No, we did not.

Q. Did you circularize the trade in 1958 for banana customers?

A. No, we didn't.

Q. You did not?

A. Not in 1958.

Q. During that time Mr. Consolo said he wanted an eighteen-month booking contract with the Chilean Line?

A. He was interested in getting regular space.

Q. Other than these five shipments in 1958, did you bring up any other bananas on the Chilean Line?

A. Yes, we had a few shipments on account for [Andes] Fruit & Produce, which ran into the Chilean fruit season.

Q. Into the Chilean fruit season?

A. Yes.

Q. Do you know how many bookings you had for [Andes] Fruit?

A. We had at least a few; I don't know offhand.

Q. Were they on the same type of letter agreement, substantially, as Exhibit 34?

A. Yes, basically.

Q. There was no long-term agreement with [Andes] Fruit?

A. No.

Q. Did they request a long-term agreement from you in 1958?

[fol. 397] A. Towards the latter part of the year, yes; they indicated a desire to contract space on an annual basis.

* * * * *

Q. In 1959, up to October 1, 1959, could you describe, generally, the type of service which was offered by the Chilean Line, the frequency of arrivals at New York, and how long it would take if they loaded bananas at Guayaquil?

A. It was the same as 1958.

Q. The same as 1958?

A. Yes.

Q. In 1959, Mr. Campion, did you circularize the trade for banana shipments?

A. Yes, we did.

Q. How was that done, by letter or by telephone or how?

A. By letters.

* * * * *

Q. In 1959, when, you say, you circularized at least a dozen prospective banana shippers, was that on the basis of individual booking agreements for each vessel or was that on a long-term basis?

A. Considering that we had a request for space from Mr. Consolo and [Andes] for space on an annual basis, we thought that it was wise to circularize the trade to make sure that according to the law we would be able to offer space to all interested parties. On that basis we sent circulars to all the shippers.

Q. Were those circulars that you sent to all the shippers a criterion, or letter, asking for their background and whether they had background, financial background, and experience in the banana business?

A. Yes, we sent a questionnaire in the form of a contract, to our requirements.

Q. In other words, Mr. Campion, you sent out to at least a dozen shippers a letter asking their background and a pro forma contract which the Chilean Line proposed to offer to the various shippers?

A. Yes.

Q. Do you know when was that done in 1959?

A. It was done around May or June of that year.

[fol. 398] The Examiner: He said he can remember a few names. Was Mr. Consolo one name that you remember?

The Witness: Yes.

By Mr. Giallorenzi:

Q. Was Mr. Consolo one of the persons to whom you addressed this questionnaire together with a form contract?

A. Yes.

• • • • •

Q. Did you receive any responses for the forward booking contract; did anybody answer you?

A. Yes, we received one from [Andes] Fruit.

Q. Did you receive any from Mr. Consolo?

A. We received a letter from Mr. Consolo to the effect that, I believe, he wanted to discuss the conditions and I recall that I answered his letter and told him that if he was interested in space, he would have to agree to those conditions that were in our questionnaire.

• • • • •

Cross examination.

By Mr. Kharasch:

• • • • •

Q. When Chilean fruit is available does your line prefer to put in the Chilean fruit rather than carry bananas from Ecuador?

A. I would say offhand, yes.

Q. Have you ever carried any bananas during the Chilean fruit season?

A. There may have been occasions.

Q. The only years that could have happened would be what years?

A. It is hard to say offhand. I believe that perhaps on occasions where maybe fruit was not available for certain vessels that might have happened but the general rule was that during the months of December through May the space was reserved for Chilean fruit.

* * * * *

Q. Do they ship Chilean fruit on your line?

A. Yes, they do.

Q. Would you characterize them as a major shipper?

A. Yes.

Q. I think that either you or, perhaps, Mr. Giallorenzi made reference to the Grace Line carriage of Chilean fruit; are you at all familiar with that?

[fol. 399] A. I know that they carry fruit the same as we do.

Q. Do you know that the Grace Line preempts all the refrigerated space from Chile?

A. In conversations I have had with the Grace Line, they don't preempt all their space, there is space enough to take care of the Chilean fruit and bananas from Ecuador.

Q. But the Chilean Line takes all the space for Chilean fruit?

A. Yes; we don't have too much space.

Q. Do you have a copy of the contract with you that you said you sent around to the trade in 1959?

* * * * *

Q. You indicated that in late 1955 the sailings averaged twenty-one days apart, is that right?

A. Yes, my recollection is that was about the average, more or less.

* * * * *

Q. The fact of your operating chartered vessels did not help the frequency of your reefer arrivals?

A. No, because the charter vessel had no reefer space.

* * * * *

Q. And in 1956 the average frequency with which your ships with reefer capabilities arrived was fourteen to sixteen days?

A. Yes.

Q. Is it true, in 1956, that every three months there would be a spread greater than fourteen to sixteen days because of the arrival of the chartered ship without reefer capability?

A. I believe that was the situation, yes.

Q. What was the minimum and maximum spread between the arrival dates of the reefer ships in 1957 in the United States?

A. Approximately every fourteen days.

Q. Is it not true that the Grace Line offered more frequent service for bananas from Guayaquil between 1955 and 1959 than your company?

A. I would say yes.

Q. Is it not true that Grancolombiana also offered more [fol. 400] frequent service during the same period?

A. Yes.

Q. In 1958, were you carrying some bananas on a voyage-to-voyage basis, is that correct?

A. Correct.

Q. And did you not carry Mr. Consolo's bananas on some consecutive voyages?

A. Yes.

Q. During the course of those voyages did he ask for additional space on later voyages?

A. Yes.

Q. Did you give him that space?

A. We gave him about, as I recall, five or six consecutive voyages at the same time we were getting requests from [Andes] Fruit for space; so we thought it was only fair to give [Andes] Fruit some space also.

Q. Then you cut off Mr. Consolo and took on [Andes] Fruit?

A. Yes, we gave Andes Fruit some voyages.

Q. How many?

A. I didn't get an opportunity to look that up, but I know that it went into December when the Chilean fruit season started.

Q. Am I correct, then, in my understanding that following the last of Mr. Consolo's shipments he wished to continue but he was not permitted to continue?

A. Correct.

* * * * *

Q. Now, would you for convenience, read into the record Mr. Consolo's letter to you of June 29, 1959?

A. "I regret to write to you at this late date but I have been out of town and I received a registered letter on June 26th, six p.m., with reference to your inquiries. The only thing I can state at this time is that the Maritime Commission on two separate occasions, one with the Grace Line and one with Grancolombiana Line, has found me to be a qualified shipper of bananas from Ecuador to the United States and, also, you have found me to be a qualified shipper as I have shipped bananas on your line.

"With reference to any further information I think it is premature until you are ready to sign a contract and have established the freight rate."

Q. What is the meaning, in the last paragraph of Mr. [fol. 401] Consolo's letter, "until you have established a freight rate"; does that indicate that you had not filled a rate into the contract?

A. It would indicate that.

Q. In reply to Mr. Consolo—

A. (Interposing) I beg your pardon; I can see now. I recall now. We added here, "to be agreed" provided, of course, that he accepted all the other conditions.

Q. Mr. Consolo wrote a letter saying that you had not established a rate, is that right?

A. That is correct, that is what he says.

Q. Did you, in reply, tell Mr. Consolo what your rate was?

A. No, we didn't tell him the freight rate.

Q. Did you establish a rate; in your correspondence with Andes did you send them a contract with a rate in it?

A. My recollection is that we sent all the contracts out in the same manner to everyone concerned.

Q. Is it right that the contract which you sent out provided for preemption of space by Chilean fruit from December 1st to [April or May?]

A. That is right.

* * * * *

Q. Let us go back for one moment to the end of 1958. Do you have before you, from Andes Fruit or Compania Frutera, offers or demands to ship on the voyages on which Mr. Consolo shipped?

A. Did we have demands from others?

Q. I am asking about Andes or Compania Frutera—let me restate the question: Mr. Consolo, we are agreed, shipped on five voyages in 1958.

A. Yes, right.

Q. I asked you if you had a demand from Andes Fruit or Compania Frutera to ship on those same five voyages.

A. Not on the same five voyages. I would say that, if my memory serves me correctly, after we made, perhaps, two or three voyages for Mr. Consolo, Andes Fruit approached us for some space also.

Q. And then, even though Mr. Consolo was interested in continuing to ship, you have the subsequent space to whom, to whom was it, to Andes?

A. To Andes.

* * * * *

[fol. 402]

Hearing Room 705, 7th Floor
45 Broadway
New York, N. Y.
May 12, 1960—9:30 a.m.

* * * * *

SAMUEL G. STAFF having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Will you please state your full name?

A. Samuel G. Staff.

Q. Mr. Staff, are you associated with Panama-Ecuador Shipping Corporation in any manner whatsoever?

A. I am.

Q. In what capacity are you associated with that company?

A. Secretary.

* * * * *

Q. Yes. After signing this agreement of July 20, 1955, Exhibit 15, did you discuss the banana business with any person or firm who had been previously in it?

A. With many people.

* * * * *

Q. Now among these people, the importers that you spoke to about the banana business, did you ever confer with Philip R. Consolo?

A. If Philip R. Consolo is Bobby Consolo, yes.

* * * * *

Q. Did your company bid for space on the Grancolombiana ships when Grancolombiana offered space to be booked to the trade pursuant to an order of the Maritime Board?

A. After the last order of the Maritime Board?

Q. Yes.

A. No.

* * * * *

Q. You have previously testified that you met one Philip R. Consolo, also known as Bobby Consolo. Can you tell us when, where, and under what circumstances, did you meet him?

A. In August of 1955, we opened an office for the purchase of bananas in Ecuador in a building known as the Sud Americana Building, an office building. In my desire [fol. 403] to know as many banana people as possible, I called on a Mr. Nebel who was the purchasing agent for, and in the employ of, I believe exclusively, for Consolo Brothers. In my conversation with Mr. Nebel, relative to the banana business in general and the purchase of bananas in particular, Mr. Nebel mentioned and suggested that when I return to New York, it would be a good thing for me to call Mr. Bobby Consolo, and he gave me the telephone numbers. Upon my return, I believe some time in September—perhaps several weeks had elapsed before I called Mr. Consolo and we had a very friendly conversation. Then Mr. Consolo asked me could he visit with me and I said, yes, and he came to my home at 300 Central Park West. During the course of our conversation, Mr. Consolo asked me about the terms of my contract with the Grancolombiana Line. I told him that I had a copy of the contract at my home and would be pleased to show it to him. He said, he'd be very, very happy to see it. I brought out the contract and showed it to Mr. Consolo.

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Q. I am sorry to have interrupted you but will you go on from there?

A. That's all right. Mr. Consolo read the contract. He was very friendly and I am sure tried very hard to be helpful; and in reading over the contract, he said to me, "you have a bad contract." He said, "this same contract was offered to me even at a lower rate but I turned it down, and the reason I turned it down was that I asked them, meaning the Grancolombiana people, to stop at Jacksonville; number two, I told them that on these boats, the Manizales, the Quito, the Medellin, the Ibaque and the Cali, all of which are noted on the first page of

this contract, contained false freight rates since the [cube] indicated next to the names of each of these boats on this first page of the contract, were unuseable space for bananas." I said, I don't know about that. Other folks have shipped bananas on these boats and Grancolombiana says this is useable space. Well, he said, "you will find out that it cannot be used." And the other suggestion he made which was very helpful was that he thought that the time allowed in Buena Ventura on the northern trip carrying [fol. 404] bananas up, the number of hours which we had agreed to allow the boats to remain there to be loaded at Buena Ventura, was too long. There wasn't anything we could do about it. We had signed the contract and I remained with the information and Mr. Consolo left very friendly and very helpful.

* * * * *

Q. Did he examine the entire contract as to rights and other provisions, particularly the 39 weeks and the 13 weeks differential in freight rate which Grancolombiana provided therein?

A. Yes. He said that we had, in that regard, good conditions; that is the 39 weeks at regular rate and the balance of the 13 weeks, the privilege of shipping only 70 percent of the cargo. He said that this was a good condition.

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Q. Were you subsequently awarded by Grancolombiana a second contract for a term of two years with an option for a third year, dated May 22, 1957?

A. We were.

* * * * *

Q. What was the condition of the fruit coming out of Ecuador in the Spring of 1958?

A. In the Spring of 1958, a great many areas—not all of the areas—but a great many of them were damaged. A great many of the banana areas where the bananas were damaged by volcanic ash which erupted from volcanoes in

Ecuador and it played havoc with bananas. Bananas came up here in virtually an unsaleable condition.

Q. You were then one of the number of shippers on the Grace Line vessels?

A. That's right.

Q. Then as you say, because of the condition of the bananas, it played havoc with the importers here?

A. Yes.

Q. Do you know what steps, if any, were taken by the Grace Line importers in this connection?

A. If I may preface my answer, I will say that as I [fol. 405] told you before, this damage played havoc with everyone. We went to the Grancolombiana Line and told them that because of this damage we would be forced under our contract to invoke [the] force majeure clause which we did. However, one of the areas that we were getting bananas from, mainly Puerto Bolivar, that wasn't ash damage there. So Grancolombiana conceded and allowed us to bypass Guayaquil and just take bananas from Puerto Bolivar.

Q. Which is also Ecuador?

A. In Ecuador. As a result, instead of shipping up 13,000 stems a week, we were bringing 6,000 stems a week and they were charging us on a prorata basis. When the industry as a whole learned of this, a meeting of the importers who were then on the Grace Line was called and I attended such a meeting.

Q. Do you know who was present at the meeting and when and where it was called and where it was held?

A. I was called on the telephone by a Mr. Palitz and Mr. Palitz said that such a meeting was to be arranged and asked me where, if I had any suggestion where it could be held, and I selected my club which is the National Democratic Club and we met there.

Q. Do you know who was there, Mr. Staff?

A. I would say every principal importer with the exception of the United Fruit Company and the Standard Fruit since they did not ship on Grace. But every shipper on the Grace was there.

Q. Was Mr. Philip R. Consolo there?

A. Mr. Bobby Consolo was there. Mr. Joselow was there. Mr. Grossman was there from West Indies Fruit. Mr. Parver of El Morro who had a contract on there. A Mr. Valentino or some "tino" or Leventino who had a contract on there. The man from the south, Lovett was there; young Billy Lovett. Frutera Sud Americana was represented by Mr. Rivera—I don't know whether that is the right name, but Frutera was represented by Mr. Rivera. There wasn't anyone absent—let me put it that way—that had a contract with the Grace Line.

Q. What was discussed at that meeting that was held at the National Democratic Club?

* * * * *

[fol. 406] A. It was the consensus of opinion that the importers or the shippers of the Grace Line needed help desperately while this condition, while the ash damage condition, lasted in Ecuador.

Q. Were any suggestions made, Mr. Staff, as to what type of help would be requested?

A. Yes. There was.

Q. What was the suggestion?

A. The suggestions were that there would be a lowering of the freight rate while this condition existed, the ash damage condition existed; the lowering of freight rate plus the right to bring in fewer bananas or less tonnage on these boats.

* * * * *

Q. Do you know whether or not anyone in connection with this meeting visited the Grace people for the relief?

A. Yes. There was a committee appointed out of the group.

Q. Who constituted the committee?

A. The committee was composed of Mr. Consolo, Mr. Parver of El Morro Company and myself with Mr. Consolo to be the chairman, the spokesman, since he had a great deal more knowledge of the banana business, number one; and number two, since he had been dealing longer with

Grace than either of us, either of the other members of the committee.

Q. Did the committee of yourself, Mr. Consolo and Mr. Parver go to see the Grace Line?

A. Yes. We did.

Q. You did?

A. Yes. We called and learned that Mr. Magner was out of town but because of the urgency on our part and on the part of the industry, we were asked to come down and discuss this with a Mr. Wensel—I think his name was—a Vice President and Executive Vice President of the Grace Line. We went down—Mr. Consolo, Mr. Parver and myself and we met with Mr. Wensel. Mr. Consolo was the spokesman since he was the chairman and he related the situation as it existed. Mr. Wensel was very receptive but said that in the absence of Mr. Magner he could not make a decision since Mr. Magner was in charge and was more familiar with the banana operations but he said that our request would receive consideration.

* * * * *

[fol. 407] Q. After the market took a radical turn for the better in Ecuadorian fruit in and about this period we are talking, did you have any further conversations with Mr. Consolo about space on the Grancolombiana and on the Grace Line vessels?

A. Mr. Consolo—of course, what I am about to say I have already reported to Grancolombiana. I presume you are asking me these questions out of some knowledge that you have of your own?

Q. Yes, about conversations with Grancolombiana, of my conversations.

A. Right. Mr. Consolo called me on the telephone.

Q. That is in a period of time after this meeting with the Grace Line people, the market turned for the better?

A. After the market had turned very good, Mr. Consolo called me on the telephone and asked me would I sell my space on the Grace Line, and I said, "Bobby, you know the Grace won't permit you to sell space on the Grace Line.

I couldn't transfer their space to you." He said, "don't you worry about that. If you agree to give up your space and sell me your space, I will arrange to take your space over." I said, "what will you give me for it?" He said, "\$5,000." So I laughed and said, "\$5,000." I said, "Bobby I'll tell you what I'll do with you. How many bananas are you and your brother carrying presently on Grace?" And he said, "a little more than 6,000 stems." I said, "O.K. I don't want any of your money. I will give you all of my space, approximately 13—it carried 13,500—stems on the Grancolombiana Line for your space which carries approximately 6,000 stems or thereabouts on the Grace Line in an even swap." He said "no, I am not interested in shipping on the Grancolombiana Line." But thinking that he might take me up, I went down to see Mr. Borrero—Dr. Diaz may be out of town—and I asked Mr. Borrero if he would, if Consolo wanted my space, whether he would allow it for this transfer and whether he would allow this transfer and release me, and he said, has Consolo asked you definitely if he wants the space? But I said, no. But I offered him all of the space. I would like to get on the Grace Line. Mr. Borrero said, you wait until he makes you a definite proposition and we'll consider it at that time. [fol. 408] Q. Was anything further done in that connection?

A. No.

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Cross examination.

By Mr. Lippman:

* * * * *

Q. You also testified that you had certain discussions with Mr. Consolo, Philip R. Consolo?

A. In September of 1955, yes.

* * * * *

Q. Was Mr. Consolo anxious to help you in your pending venture with Grancolombiana?

A. He appeared, yes.

Q. Did he in fact offer you any helpful advice?

A. Yes. He did.

Q. Mr. Staff, at this meeting you showed Mr. Consolo a copy of your Grancolombiana contract, is that right?

A. Yes.

Q. Is it your testimony that he criticized the contract in certain respects?

A. My testimony is that Mr. Consolo was very definite against certain rates in the contract plus the fact that the useable space in the contract, the useable cubeage, was misstated in the contract, and also the fact that they wouldn't stop at Jacksonville, and the contract held no appeal for him whatsoever. He also informed me that the rates offered to him were lower than I was paying under this contract.

Q. The contract that you showed him was the contract that Mr. Giallorenzi showed you, which is in evidence as Exhibit 15?

A. This contract here that is marked Exhibit 15 in front of me.

* * * * *

Q. In the Spring of 1958, you were shipping both on Grancolombiana Line and on the Grace Line?

A. Yes. We were.

Q. You then went to the Grancolombiana Line and you told them about this condition of the fruit, of the Ecuadorian fruit, this volcanic ash condition?

A. Yes.

Q. They, in turn, allowed you certain concessions?

A. They allowed it because of their close contact with Ecuador. They had checked with their general manager down there, a Mr. Zevallos, and Mr. Zevallos corroborated [fol. 409] the fact that this condition existed and number two, we also told them that we had the right, under our contract, to invoke a force majeure.

Q. As a result of these discussions with Grancolombiana, they allowed you to load fruit in Port of Bolivar?

A. They allowed us to buy or rather by-pass what is known as the area at Guayaquil and the railroad area

where the damage was greater and load only in Port of Bolivar and charged us pro rata.

Q. In other words, they also allowed you to reduce your minimums in your contract?

A. Yes. They did.

Q. They allowed you to ship only 6,000 stems?

A. A minimum, I believe, of 6,000.

Q. A minimum of 6,000?

A. Yes.

Q. And the freight rates were reduced proportionately?

A. Yes.

* * * * *

Q. I don't believe you have answered my question, Mr. Staff. Specifically, did the Grace Line ever grant you any concessions for this period of time covering the period of volcanic ash shipments?

* * * * *

Examiner Robinson: I understand your point but you can answer the question. Did they give you any relief?

Mr. Giallorenzi: You can answer yes or no.

The Witness: No.

By Mr. Lippman:

Q. You never got any relief?

A. No.

Examiner Robinson: We understand the reason. We just want that answer that you got no relief.

A. We only went there, when we went to Grace, in good faith.

Examiner Robinson: We are not questioning that at the moment. It is just that they did nothing affirmatively to relieve you.

The Witness: That's right. It was held in abeyance until Mr. Magner came back.

[fol. 410] Examiner Robinson: But when Mr. Magner came back, he still didn't do anything for you?

The Witness: The crisis was over.

Examiner Robinson: That is not the answer. Did he or didn't he give you any relief?

Mr. Giallorenzi: He answered no.

* * * * *

JACK FRIEDLANDER having been previously sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

* * * * *

Q. Did you apply for space on the Grancolombiana vessels when the space was open pursuant to a Board order to shippers?

A. No. We did not.

Q. Did you receive an invitation?

A. We did receive an invitation but we did not bid.

* * * * *

Q. When, for the first time, did you meet Mr. Consolo?

A. I met Mr. Consolo in the Fall of 1955 for the first time.

Q. Do you know where you met him?

A. I first met him with Mr. Staff, I believe.

Q. Where was that?

A. I believe we had luncheon at the National Democratic Club in New York.

Q. That was the first time you met?

A. Yes.

Q. Did you discuss at that time, that is the first time you met him, the terms of the Grancolombiana contract; that contract which was entered into by Messrs. Morey and Staff on July 20, 1955, Exhibit 15. This agreement that I have here?

A. Yes.

Mr. Kharasch: This is a lunch at the Democratic Club?

By Mr. Giallorenzi:

Q. Do you know whether that luncheon at the National [fol. 411] Democratic Club took place before or after Mr. Staff's meeting at his apartment, at Mr. Staff's apartment?

A. It took place after the meeting in Mr. Staff's apartment.

Q. It took place after that meeting in Mr. Staff's apartment?

A. Yes.

Q. Did Mr. Consolo, at this luncheon, discuss with you the terms of the Grancolombiana contract?

A. Yes. We did discuss the terms of the contract. Specifically, there were three basic things that we discussed—the amount of cube that was mentioned on each of the vessels that were named in the contract; the calling port, the unloading port was discussed and the rate was discussed. Mr. Consolo said that he had an opportunity of making a more advantageous contract with Grancolombiana on rate per vessel. He also said that in all of the lower holds of these vessels there was a large amount of cubeage that could not be used because of the high deck, height and the lower holds, and that he didn't believe that Philadelphia was a good place to arrive with these bananas; that actually it would be much better market-wise if the bananas were unloaded at Jacksonville.

* * * * *

Q. Did you hear Mr. Staff testify to certain meetings which were held by the Grace Line shippers in connection with this thing which had occurred?

A. Yes. I also attended these meetings.

* * * * *

Examiner Robinson: Do you have anything further to add to what Mr. Staff said on that or do you corroborate what Mr. Staff said?

The Witness: I corroborated exactly what Mr. Staff said. I do know that Mr. Joselow took a much firmer stand at the second meeting and agreed to send a wire to the

Grace Line under his own signature requesting immediate aid from this blight situation in Ecuador.

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By Mr. Giallorenzi:

Q. During this period of time, Mr. Friedlander, do you [fol. 412] know whether any of the shippers aboard the Grace Line relinquished their space?

A. Yes. I think there were three shippers that relinquished their space, Leventino, El Morro and Swanee Steamship.

Q. Was there any talk at these two meetings which you testified to, about any shippers giving up their space to Standard Fruit?

A. Yes.

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Q. Mr. Friedlander, at these meetings was anything said about giving up space of the Grace Line vessels by the shippers to the Standard Fruit Company?

A. Mr. Lovett who was a shipper on the Grace Line was also very close to the Standard Fruit Company. His companies chartered on different occasions banana vessels to Standard Fruit Company and he had received a proposal from Standard that they wished to reduce their shipments to New York because of this blight situation, before mentioned, in Ecuador and if they could get part of the space on the Grace Line vessels, about 15,000 stems worth, they would eliminate one of their Ecuador vessels to New York which would alleviate the space problem. Mr. Lovett came up to give the other Grace Line shippers this information and everybody, all of the shippers who were at the meeting, agreed to reduce their allocations of space on the Grace Line to give the amount of cubeage for 15,000 stems to Standard. A proposal was made to the Grace Line and just as this was happening, the market changed.

Q. It took a turn for better, which Mr. Staff told us about?

A. That's right.

Q. Do you know the names of the shippers, other than those that got off, that agreed to give up part of their space to the Standard Fruit Company?

A. Consolo Banana Distributors; Joselow; ourselves; Swanee; El Morro; Leventino; Frutera Sud Americana.

Examiner Robinson: What is the general agreement on that?

By Mr. Giallorenzi:

Q. In other words, all the remaining ones agreed to give up part of their space?

A. Yes.

[fol. 413] Q. Did you have any conversation with Mr. Consolo with reference to trading his Grace Line space for the Grancolombiana space?

A. I was at the meeting that Mr. Staff talked about where Mr. Staff offered him all of our space on the Grancolombiana in exchange for his 6,000 some odd stems on the Grace Liners. As a matter of fact, it was at my suggestion that the proposal was made.

Q. In other words, you told Mr. Staff to offer to Mr. Consolo your Grancolombiana space in return for it, Mr. Consolo's Grace Line space?

A. That is correct.

Q. Why were you willing to give up 13,500 stems for 6,000?

A. I figured and all my testimony in the other hearings will bear that out, I considered them superior banana carriers operating on a more reliable schedule.

Q. That is the reason you were willing to give up this space for a smaller amount of cubeage?

A. That's correct.

* * * * *

By Mr. Giallorenzi:

Q. I will withdraw the question. Mr. Friedlander, were you present when Mr. Staff talked to Mr. Borrero about swapping Grancolombiana space with Mr. Consolo?

A. I was.

Q. Do you recall where that conversation took place?

A. It was in the office of Grancolombiana. We went to see—we were actually looking to see—Mr. Diaz who was the general manager. But he was out of the country and we thought we could expedite the matter by seeing Mr. Borrero.

Q. What was said at the conference?

A. Mr. Staff was very anxious to pursue this swap of space, hoping to do a selling job on Consolo because Consolo hadn't protested too much, rather hadn't professed too much interest in this swap of space. But he wanted to see what Grancolombiana's attitude would be, if we could pursue the matter further; and Mr. Borrero said there was no point in taking any active steps until we could see whether or not we could make a deal with Consolo on such a swap.

[fol. 414] Q. Was anything further done in connection with this swap of space?

A. I saw Mr. Consolo at the piers in New York several times shortly after the original meeting and I believe, not that I believe I know it, that I believe I know that Mr. Staff spoke to Consolo several times after this original meeting trying to negotiate this transfer of Consolo space if he wasn't interested in making the exchange.

Q. You say that the matter then died?

A. The matter then died.

Q. Do you recall ever seeing Mr. Consolo and Mr. Palitz of Banana Distributors on a Grace Line pier during the unloading of bananas on occasion or on several occasions?

* * * * *

Q. Mr. Friedlander, do you recall an occasion during the unloading of a Grace Line vessel having seen Mr. Consolo and Mr. Palitz on the pier?

A. There were many, many times I saw them both on the pier during the unloading operations.

Q. Do you recall seeing both Mr. Palitz and Mr. Consolo together during one of these unloading operations, sub-

sequent to the time when Banana Distributors filed a complaint for reparations against Grancolombiana?

A. Yes. I do.

Q. Can you tell us in your own words what was said at that meeting between yourself, Mr. Consolo and Mr. Palitz, subsequent or immediately after Mr. Palitz on behalf of Banana Distributors filed a complaint against Grancolombiana? Please keep your voice up.

A. As I recall the incident, they, both Mr. Consolo and Mr. Palitz, in a very friendly way took great delight in needling me on these unloading operations in a friendly way. On this occasion, they talked about the fact that they had filed this suit with the Maritime Board against Grancolombiana to prove that Grancolombiana was a common carrier, and they were going to get us off the vessels, and we wouldn't be in the business any longer, and I was quite provoked and said, "well, that is wonderful. I hope you go ahead with your case. I hope you win the case. I hope you get the Grancolombiana space and have your [fol. 415] trials and tribulations in operating that space and further, I also hoped that the market degenerates in position so that you will both lose your shirts". The reply from both of them almost instantaneously was, "who in the world is interested in the space? We are only interested in getting money out of the damages from Grancolombiana."

Q. Did you have further conversations on that date with these two gentlemen in connection with their claim for damages against Grancolombiana?

A. It was a constant needling process on almost any unloading where they were both present and I was present.

Q. Mr. Friedlander, when you were shipping bananas on the Grancolombiana vessels, could you tell us in what states or cities generally, that you sold your fruit?

A. We sold our fruit west, pretty well as far as Illinois, the State of Illinois; north, into Canada with the exception of New England and the local New York market and in New Jersey, upper New Jersey we didn't sell; and south as far as possibly the State of North Carolina and west, Virginia. That kind of is the boundary line.

Q. Do you know generally how many jobbers in this territory you sold bananas to?

A. We sold to or how many jobbers there were?

Q. How many did you sell to?

A. We sold approximately to 50 or 40 jobbers.

Q. Out of these 40 or 50, did you have regular customers that would come back to you consistently?

A. I would say that about 90 to 95 percent of the customers were the same every week.

Q. What percentage of your sales did these 90 to 95 take?

A. 90 percent.

Q. In the same territory that you have described which you sold to while carrying bananas on Grancolombiana vessels, did you have any idea from how many jobbers in toto there were during this time?

A. I believe there would be between 700 and 800 jobbers.

Q. Did the other importers, both the independents and the large companies as United Fruit and Standard Fruit, also sell bananas in this very same territory?

[fol. 416] A. Most of the bananas in that territory, the great overwhelming part, was sold by United Fruit and Standard Fruit.

Q. These jobbers which you have described, which you were selling to, 40 to 50, do you know whether they also bought from other independents?

A. Only a very small percentage bought from other independents and then generally only when Standard and United were in very short supply.

Q. Did you look to United and Standard for their supplies for the jobbers which you sold to?

A. That's correct.

Q. Did you make it a practice not to sell jobbers who were buying from independent importers where possible?

A. We have always made it a practice of trying to sell all of our fruit to Standard and United customers, jobbers who buy from independents, other independents such as ourselves. We found ourself pretty well locked in the competitive position, we would then try to avoid that type of account.

Q. Can you tell us why you made it a practice, wherever possible, to not sell to the jobbers who were buying from independent importers?

A. We could always get a better price from competition against Standard and United than we could from the jobbers who were buying from other independents.

Q. As a result of having this space on the Grancolombiana vessels, were you able to obtain as customers any jobbers from whom Consolo was a distributor, that is Dixon?

A. You mean the company who distributed Consolo's fruit?

Q. Yes. Did you prevent Consolo distributors from obtaining customers?

A. No, sir.

Q. At the last hearing as part of this series of hearings, Mr. Meyer who was the President of R. Dixon, testified that his company was not in competition with Panama Ecuador. Do you agree with that statement?

A. Basically, that is a true statement, yes. That was at the time we were shipping on Grancolombiana?

Q. Yes.

A. Yes.

[fol. 417] Q. I should have prefaced those questions by saying that all of those questions dealt with the time that you were shipping aboard the Grancolombiana vessels?

A. Yes.

Q. And if I had said that, would your answers have been the same?

A. That is correct.

Q. You have testified that you are no longer shipping aboard Grancolombiana vessels, is that correct?

A. Yes.

Q. You have your own tonnage that you are now using?

A. We have our own chartered vessels.

Q. You operate charter vessels now?

A. Yes.

Q. To carry bananas from Ecuador to New York?

A. That's correct.

Q. Since your company gave up space on Grancolombiana, have you continued to sell to the same customers as when you were on the Grancolombiana vessels?

A. We have all of the customers that we sold to previously, yes.

Q. How about the quantity, do you sell the same quantity as you did before?

A. We sell in proportion naturally more.

Q. You sell proportionally more?

A. Yes, possibly 100 percent more.

Q. How many bananas do you now import per week, Mr. Friedlander, on these chartered vessels?

A. Approximately 45 to 50,000 stems per week.

Q. What were you averaging on the Grancolombiana?

A. As I said, we averaged between 12 and 13.

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Cross examination.

By Mr. Kharasch:

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Q. You also testified that at some meeting the independent banana importers wanted to give up some space so that Standard Fruit would give up a sailing, is that right?

A. Would give up one of their own chartered vessels [fol. 418] that loaded fruit in Guayaquil and discharged in New York.

Q. In other words, the idea was to lessen the amount of bananas coming into New York market?

A. That is correct, lessen the amount of bananas and particularly, the bad bananas.

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Q. You said you offered the Grancolombiana space to Mr. Consolo in return for his space on the Grace Line. Did you make that proposition in writing?

A. No, sir. But it was a very serious proposal.

Q. At the time you made that proposal, Mr. Friedlander, was Mr. Consolo's complaint then pending before the Maritime Board against Grancolombiana?

A. I can place the time we made the proposal. This was about May or June of 1958. Was the complaint pending at that time?

Mr. Giallorenzi: As a matter of record, the complaint was pending from November 15, 1957.

By Mr. Kharasch:

Q. Did you or your company ever offer a portion of Grancolombiana space to Consolo without demanding that he give up some space to you?

A. No. We didn't offer any space to him but we offered to take him in as a partner on several occasions. On more than one occasion, at least three or four, though I can't remember very distinctly.

Q. Since the complaint was pending, did you notify Grancolombiana that you were willing to give up part of your space to Consolo?

A. We never offered to give part of your space to Consolo. We offered, either to take him in as a partner or we offered to swap our space for space on the Grace for our space on the Grancolombiana.

Q. But you did not offer him any portion of your space on Grancolombiana?

A. We never discussed dividing the space with him on his own. We always discussed a partnership. He never expressed any interest to us in wanting a part of this space.

* * * * *

[fol. 419] Examiner Robinson: Mr. Friedlander, let me ask you just a couple of innocuous questions. They don't involve your company in any way. You needn't worry about it. You say you are at present chartering a ship. Are you the sole shipper?

The Witness: Yes, sir. We are.

Examiner Robinson: What is the approximate cubeage of that, refrigerator space?

The Witness: We have two of the ships that have 225,000 cube and one of the ships has 240 cube.

Examiner Robinson: They are good sized ships?

The Witness: Yes.

Examiner Robinson: They are foreign flag ships?

The Witness: One is a Danish; one is a Norwegian and one is German.

Examiner Robinson: You are the sole shipper on them?

The Witness: Yes, sir. The sole shippers.

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[fol. 421] LOUIS GROSSMAN having been duly sworn testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Grossman, are you here or have you come here pursuant to a subpoena which I had served upon you?

A. Yes, sir.

• • • • •

Q. Will you please tell us what, with what company you are now associated?

A. West Indies Fruit Company.

Q. Where is the head office?

A. In Miami, Florida.

Q. What position do you have in that company, Mr. Grossman?

A. I am a partner in the firm.

Q. Are you an officer of the company also?

A. I am President of the Company.

Q. What kind of business is the West Indies Fruit Company engaged in at the present time?

A. Importing bananas from South America and Mexico and the Dominican Republic.

Q. Colombia also?

A. Colombia, that is South America.

Q. How long has the West Indies Fruit Company been engaged in this type of business, Mr. Grossman?

A. Close to 15 years.

Q. How long have you been engaged in the banana trade [fol. 422] or banana business, the importation of bananas?

A. Thirteen years.

* * * * *

Q. In addition to having bananas imported by the West Indies Fruit Company on these two liner services which you have described, has your company from July of 1955 up to October 1, 1959, chartered vessels?

A. Yes. We have.

Q. Do you do the chartering of vessels for your company?

A. Yes. I do.

Q. Do you keep in touch with the chartering services as to the availability of tonnage?

A. Regularly.

Q. Mr. Grossman, can you tell us, from July of 1955 to September of 1959 whether or not in your opinion, there was available reefer tonnage suitable for carrying bananas from Guayaquil to United States ports of about 45 to 65,000 cubic feet?

A. Yes. There was.

Q. Did your company, during this period of time, charter any vessels about that size for the purpose of carrying bananas?

A. Yes. We did.

Q. Can you tell us whether those boats were used in the Ecuador Gulf trade which you deal in?

A. Yes. They were.

Q. Am I correct in stating that these vessels were chartered by you at the same time that you were carrying bananas in a liner service?

A. Yes.

Mr. Lippman: Which Liner service. I want the record clear.

By Mr. Giallorenzi:

Q. Which Liner service, Mr. Grossman?

A. We started with Grace Line in 1957 and we started with Grancolombiana in 1957, and we chartered vessels from that time on to come into the Gulf.

Q. How many vessels would you say your company has chartered for the carriage of bananas during this period of time from July of 1955 to September 1, 1959?

A. I don't remember exactly but there are a good number of them.

[fol. 423] Q. Could you give us an approximation?

A. Around fifteen.

Q. Fifteen?

A. Yes, around.

Q. Do you know whether they were charter or trip charters or long term basis?

A. Most of them were on a long term basis.

Q. How long would those charters last, Mr. Grossman?

A. Generally speaking, one year.

Q. Did you at any time have difficulty in chartering this type of tonnage?

A. No.

Q. What size tonnage did you charter in connection with your Guayaquil - Gulf service or Gulf ports where you operate principally?

A. They range anywhere from 34,000 cubic up to, mostly up to 80-90,000 cubic. Occasionally, we take on a 200,000 cubic vessel.

Q. Would you say that the majority of your chartered ships were between 30 to 80,000 cubic feet?

A. Yes.

Q. Do you know—you operated those vessels carrying bananas, is that correct, Mr. Grossman?

A. Yes, sir.

Q. And you operated them from Guayaquil to the United States Gulf coast?

A. That's right.

• • • • •

Q. Could you tell from the characteristics of these vessels whether some or all of them which you had chartered, could have come from Guayaquil to ports north of Hatteras?

• • • • •

A. Most of the ships had the ability of coming here to New York.

Q. Would you have chartered any of these vessels if you didn't consider them economically feasible for your trade?

A. No, sir.

• • • • •

Q. Do you recall coming to New York for a meeting of the Grace Line shippers in and about—between mid-March and mid-July of 1958?

A. Yes.

Q. Can you tell us where and when, if possible, this meeting was held?

A. A meeting was held, I think, at the local Democratic Club here in Manhattan.

[fol. 424] Q. Would that be the National Democratic Club?

A. Yes.

Mr. Giallorenzi: Off the record.

(A discussion was had off the record.)

By Mr. Giallorenzi:

Q. Mr. Grossman, do you know who was present at that meeting?

A. All the importers of any consequence on the Grace Line.

Q. Do you know whether Mr. Philip R. Consolo was present?

A. Yes. He was.

Q. Can you tell us briefly what was discussed at that meeting?

A. Generally speaking, we were all in the same difficulties. We needed relief in one fashion or another. We didn't know

how to go about it as far as Ecuador was concerned. It was something beyond our control. Being it was a disease, it was nothing we could do. But we thought we could go to our shipping line company, which was Grace in this instance, and ask for relief in either reducing the minimum or reducing our rate because of the way we were going at that time, we were all getting hurt badly. It was a question whether we were able to continue for a much longer period. There were also thoughts thrown out about asking the government or Ecuador for relief. No one seemed to agree that we would get relief from that source so we mutually agreed to go to Grace Lines and ask for help.

Q. Do you know who, if anyone on behalf of the independent shippers, went to the Grace Line?

A. We appointed a committee, if I recall, and I think Mr. Staff was appointed, Mr. Consolo.

Q. That's Philip Consolo?

A. Philip Consolo and Ted Parver. Those are the only three I recall, possibly one other one but I don't remember.

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Cross examination.

By Mr. Kharasch:

* * * * *

Q. Is the record clear, that all of your charter ships are [fol. 425] brought to the United States Gulf from Ecuador?

A. Only in one instance, I think, we brought cargo into Norfolk; there might have been two instances.

Q. Was that because of a strike?

A. It was a bad period in the south and it was decided to come north.

* * * * *

Q. What Gulf port do your bananas usually come into, is that New Orleans?

A. No. We come into Galveston, Texas; occasionally in Brownsville, Texas but Galveston for the most part.

Q. Isn't it a longer voyage to New York from Ecuador than it is to Brownsville or Galveston?

A. Is it a longer voyage to New York?

Q. Yes?

A. Oh yes.

Q. Can you give us an idea how much longer it is?

A. It would mean two or three more days.

Q. You said you had some 15 ships on charter. What was the greatest number you had at any one time on charter?

A. Not considering the liner service, 12.

Q. How many arrivals did that give you?

A. Too many.

Q. Of these 12, were they on long term charters or one voyage charters?

A. Most of them are on long term charters.

Q. By which you mean a year or longer?

A. No. I would say a year or lesser. They were not trip charters.

[fol. 426]

Room 4458
New GAO Building
Washington, D.C.
Thursday, May 26, 1960

ALVARO DIAZ S. was called as a witness and, having been first duly sworn by Examiner Robinson, was examined and testified through interpreter as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Dr. Diaz, by whom are you presently employed?

A. The Grancolombiana Fleet.

Q. And how long have you been employed by Flota Mercante Grancolombiana?

A. Fourteen years.

Q. In what capacity have you been employed by Flota Mercante Grancolombiana during these past fourteen years?

A. As general manager, sir.

Q. Dr. Diaz, I show you Exhibit 15, an agreement entered into by Flota Mercante Grancolombiana on July 20, 1955, with Messrs. Morey and Staff, and ask you if that is your signature?

(Document handed to witness.)

A. It is sir.

Q. Dr. Diaz, are you familiar with the terms of this contract, Exhibit 15?

A. Yes.

Q. In the original negotiations of this agreement, Exhibit 15, did you participate in those negotiations?

A. Yes, I did.

Q. Prior to the expiration of contract dated July 20, 1955, Exhibit 15, did you on behalf of Grancolombiana ask interested shippers to submit their bids for the refrigerated space referred to in that contract?

A. I did, sir, through the New York office.

Q. And did you receive any bids in connection with the renewal of a contract, Exhibit 15, Dr. Diaz?

A. For the renewal of the contract?

[fol. 427] Q. Yes, for the renewal of the contract.

A. I did.

Q. Now I show you two letters dated January 14, 1957, and February 4, 1957, on the letterhead of Samuel G. Staff, and ask you if you received those letters?

(Documents handed to witness.)

A. I did.

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Q. Dr. Diaz, I show you page 2 of Exhibit 25 and ask you if Flota received, in connection with the bids for the renewal of contract known as Exhibit 15, this bid from Philip R. Consolo?

(Document handed to witness.)

A. I only received this letter.

Q. Dr. Diaz, in addition to the bids received from Mr. Staff, Exhibits 119 and 120 for identification, and the bid received from Mr. Consolo, page 2 of Exhibit 25, did you receive any other bids?

A. I have.

Q. Was that bid from Mr. Noboa?

A. Yes, sir.

Q. Dr. Diaz, did the board of directors of Flota Mercante Grancolombiana consider these bids which were received for the space referred to in Exhibit 15?

A. Yes, sir.

* * * * *

Q. And did the board of directors of Flota Mercante Grancolombiana, in considering these bids, hold meetings?

A. Yes, they did. Not only did they have meetings, but the matter was also considered in subcommittees as previous or prior study to submit the board of directors.

* * * * *

Q. And at those meetings, was the offer of Mr. Consolo, contained in Exhibit 25, page 2, considered and passed upon?

(Document handed to witness.)

A. It was considered but not approved.

* * * * *

Q. Can you tell us who was the successful bidder on the space?

A. The Ecuadorian Fruit Company represented by Mr. Staff.

[fol. 428] Q. Now I show you an agreement dated May 22, 1957, Exhibit 16, and ask you if that is your signature?

(Document handed to witness.)

A. It is.

Q. Again referring to Exhibit 16, can you tell us whether or not that was the contract entered into with Panama Ecuador Shipping Corporation based upon the authoriza-

tions which you received from the board of directors of Flota Mercante Grancolombiana?

A. Yes, it is.

* * * * *

Q. Now, Dr. Diaz, you testified you were present at the board of directors' meetings in considering these offers which were made for the [renewal] of the previous contracts which were about to expire. Is that correct?

A. Yes, it is.

Q. And you testified, Dr. Diaz, that in considering these offers, not only did the board of directors consider them but also subcommittees considered them; is that correct?

A. Yes, sir.

Q. Now, in considering the offer of Philip Consolo at page 2, Exhibit 25, will you tell us on what basis this offer was considered by the subcommittees and the board of directors of Flota Mercante?

A. The explanation is very simple. These were considered under the same conditions as all contracts that go before the board; namely, 37-week contract with full tariff and 13-week contract with a discount, or reduced tariff, if I get it correctly.

Q. Dr. Diaz, you said 37 weeks at the full tariff. Do you mean that or do you mean 39 weeks at the full tariff?

The Interpreter: He means 39.

By Mr. Giallorenzi:

Q. So that in order to clarify the answer, it was the board of directors that considered the offer of Mr. Consolo based on 39 weeks at the full rate and 13 weeks at the reduced rate?

A. Thirty-nine and 13, as it considered other proposals. [fol. 429] Q. In other words, other proposals were considered on the same basis, the high season for 39 weeks and low season for 13 weeks?

A. Yes. That has been the custom ever since it has had banana contracts; that is the way in which it is considered under all circumstances.

Q. By that, you mean a certain period during the year with a lower rate and a certain period during the year with a higher rate; is that correct?

A. Yes, sir.

Q. And that is the manner in which you considered Mr. Consolo's officer?

A. Yes, sir.

Q. Now, Dr. Diaz, again referring to Mr. Consolo's offer, Exhibit 25, page 2, did you consider any other aspects of the offer which Mr. Consolo made to you?

When I say "you," I mean the board of directors.

A. This is a very interesting question, sir. When the board of directors studies a contract, it considers several aspects of it, which is of course natural, not only the aspect of price.

Now, in reference to your specific question, sir, the board of directors did not approve Mr. Consolo's contract. First, because its price was lower than the Ecuadorian Fruit. In the second place, because Mr. Consolo in his letter requested that the ports to which the bananas would be shipped would be left at his discretion. And for the fleet, that was an impossible thing because our itineraries would suffer considerably as a result. And so much so because I want to point out that our main business is not that of the transportation of bananas. Third point, because we had had before the year 1955, which was the date of the first contract with the Ecuadorian Fruit Company, we have had, as I say, much trouble and difficulties with the banana contracts that we had engaged in. And only in the case of the contract of 1955 with the Ecuadorian Fruit Company we had at that particular time of the two-year period, we had, as I say, a very good progress in the development of the contract. We had no difficulties or troubles whatsoever. [fol. 430] And consequently, the board of directors believed it very suitable, very convenient to extend the contract with the same person through whom such good results were achieved. And I believe that is a very normal factor in all business transactions in my country and in all parts of the world.

* * * * *

A. Also with reference to Mr. Consolo's letter, it is stated that other details pertinent to the contract would be discussed later. And the board of directors considers that, in this sort of a contract, the details are extremely important—or not details, excuse me, but they are indeed important matters. And since we had other offers like the one of Mr. Staff, we didn't think that it would be advisable to wait and to discuss details that perhaps would never be fully solved, fully presented. And we might have lost the contract that we had in mind if we had given this much more time.

Q. Now with reference to the Consolo proposal in Exhibit 121, did you also use two years as a basis for this proposal?

A. Yes, despite the fact that the contract did not refer to two years.

Q. You mean Mr. Consolo's offer did not refer to two years?

A. That is right.

Q. Now, Dr. Diaz, can you tell us what difference, if any, did you find in the rates for the two-year period as proposed by Panama Ecuador and Mr. Consolo, as shown in Exhibit 121 for identification?

A. Approximately \$111,000.

Q. Who will pay that amount in excess if any?

You say it shows about \$111,000. Is that additional freight rate which would be paid by Panama Ecuador or by Consolo?

A. It would be what the Panama Ecuador Company would pay in excess.

Q. Of what Consolo was offering him to pay if he were awarded the contract?

A. Yes, sir.

[fol. 431] Q. Dr. Diaz, does Flota Mercante Grancolombiana have a specific itinerary for its vessels?

A. It does.

Q. And would Flota Mercante enter into a contract for the carriage of bananas where the discretion of the discharging ports in the North Atlantic would be left to the shipper?

A. No, sir.

Q. Why not?

A. In the first place, that would put an end to the itineraries of the Grand Fleet without which we would not be able to offer good service to those using the services of the Grand Fleet. And I repeat, sir, that the transportation of bananas is not the principal business carried out by the Grancolombiana Fleet. It is only a collateral activity. And if we had to keep in mind the desires of the banana shippers exclusively, we would cancel those contracts.

Q. In other words, it is your testimony, Dr. Diaz, that you always—and by you, I mean your company always wishes to reserve its right exclusively for the itinerary of the vessels?

A. Yes, sir. And for that reason, contracts before the year 1955 were canceled where the shippers requested that such-and-such ports be touched and the Grancolombiana Fleet cannot operate that way.

* * * * *

Q. Now, Dr. Diaz, you will note that this letter which you sent is dated March 25, 1957, page 3 of Exhibit 25. And you will note that in this letter, you stated to Mr. Consolo that the offers contained in yours of March 6, which is page 2 of Exhibit 25, which we are here answering, are considered together with other proposals by the board of directors and by the general management of this company. Is that correct, Dr. Diaz?

(Document handed to witness.)

A. It is.

Q. Now, Dr. Diaz, will you explain that to us in the light of the fact that the board of directors on March 13, 1957,

Exhibit 18, awarded the contract to Panama Ecuador Company?

A. Would you please explain the question a little more, sir?

[fol. 432] Q. Yes. On March 25, 1957, you wrote Mr. Consolo that his offer was being considered; is that correct?

A. That's right, sir.

Q. Now, can you tell us why on March 25, 1957, you stated to Mr. Consolo that his offer was being considered when the board of directors on March 13, or twelve days before that, Exhibit 18, Minutes Number 482, had decided to award this contract to Panama Ecuador?

A. The reason is very simple. None of the actions of the board of directors has validity until the minutes of a particular business has been approved. Because on many occasions, on the occasion of minutes being approved, misunderstandings may arise or the need for explanation as to that reason, and it is for that reason until the minutes are approved in the following meeting, the general manager cannot communicate anything official in that respect.

Q. Well, I understand your testimony to be, Dr. Diaz, that it is necessary to ratify the board of directors' resolutions at a subsequent meeting?

A. Yes, sir.

Q. At a subsequent meeting of the board of directors?

A. Yes, sir.

Q. And was that done in connection with the minutes which were entered by the board of directors on March 13, 1957?

A. It certainly was. Like all minutes.

Q. Do you know what date the minutes of March 13th of the board of directors, March 13, 1957, were ratified?

A. I haven't the exact date, but I can assure you that it was subsequent to the twenty-fifth of March when I wrote to Mr. Consolo.

Q. Do you know whether you were present at the next board of directors' meeting after the letter of March 25th written to Mr. Consolo?

A. I was present a few days subsequent to the sending of this letter. I am not exactly sure of it.

.

[fol. 433] Q. Now, Dr. Diaz, again referring to Exhibit 25, I show you page 4 of that letter, of that exhibit, which is a letter addressed to Mr. Consolo, and ask you if you recognize the signature on that letter?

(Document handed to witness.)

A. It is that of the secretary general.

Q. That's Mr. Gutierrez?

A. Yes, Mr. Gutierrez.

Q. Now I show you a letter dated June 21, 1957, photostat of a letter, and ask you if you know whether that letter was sent to Mr. Noboa? Also it is dated June 21, 1957.

(Document handed to witness.)

A. Yes, sir.

.

Q. Now, Dr. Diaz, referring to Exhibit 122, letter of Dr. Gutierrez, dated June 21, 1957, is that similar to the letter Dr. Gutierrez sent to Mr. Consolo on the same date?

(Document handed to witness.)

A. Yes, it is, sir.

Q. Was Mr. Noboa the other unsuccessful bidder on the North Atlantic?

A. Yes, sir.

.

Mr. Kharasch: Mr. Examiner, at page 8 of the Board's decision in this case served July 2, 1959—

Examiner Robinson: You are talking about the mimeographed copy now?

Mr. Kharasch: That's right. I have just—

Examiner Robinson: I was thinking in terms of page number. It has since been printed.

Mr. Kharasch. This is the mimeographed copy.

The Board said, "It is clear from this record that both complainants are qualified banana shippers. It is similarly clear that they were denied reefer space accommodations by Flota to their prejudice and disadvantage and that Panama Ecuador, in receiving and using that space, was [fol. 434] favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants and in granting that space to a single favored shipper, Flota has acted in violation of Section 14(4) and 16 of the Act."

In the light of that finding on the common carrier phase of this case, we feel that all of Dr. Diaz's testimony this morning is subject to being stricken as an attempt to re-litigate a subject already decided by the Board. His testimony has been, generally speaking, an excuse for the conduct of Flota during the period they were discriminating against our client.

We would like at this point to move to strike the testimony of Dr. Diaz as irrelevant to any issue now before you.

It occurs to us that Dr. Diaz is here from out of town and we have some need to speed up the proceedings. If you desire, we are willing to argue that point in our brief rather than take up time this morning on the argument.

Examiner Robinson: I don't think there need be any argument because if you want a ruling now, I will give it to you now.

Mr. Kharasch: All right, sir.

Examiner Robinson: You want it?

I deny your motion to strike.

• • • • •

Cross examination.

By Mr. Kharasch:

• • • • •

Q. In the year 1957, or in the year 1958, or in the year 1959, prior to the decision of the Federal Maritime Board in this case, did Flota ever tell Mr. Consolo what its rates and condition of carriage for bananas would be?

A. It did not indicate it because since these were private bids, the bidders would indicate their bids in the course of the conversations.

[fol. 435] The bids are offered without the others knowing what the bids are, obviously. It is a private matter.

Q. Your answer is not true as to Panama Ecuador, however; is that correct?

A. Yes, it is. I will give the reason why. Because Panama was not informed as to what the other bids were; namely, by Mr. Consolo and Mr. Noboa.

Q. Did not the contract call for informing Panama Ecuador of any bids made by other applicants?

A. Would you repeat the question, please?

Q. You have said that one bidder was not shown the other bidder's bid.

A. Yes.

Q. Is it not true that the contract, the earlier contract with Panama Ecuador, gave Panama Ecuador the right to meet any other bid?

Mr. Giallorenzi: The contract speaks for itself, Mr. Examiner.

Examiner Robinson: I think that's been agreed upon.

Mr. Giallorenzi: It's been agreed upon. And you only have to tell the other, Panama Ecuador, in the event their offer was inferior to the other ones which we received. That was our only obligation to them.

* * * * *

[fol. 436]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 15

AGREEMENT entered into this 20th day of July, 1955, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation with its principal place of business in the City of Bogota, Republic of Colombia, S. A. (hereinafter called "GRANCOLOMBIANA"), acting herein through its duly authorized Agent, the North American Division of TRANSPORTADORA GRANCOLOMBIANA, LTDA., a Colombian limited liability company authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and Mr. LEONARD MOREY, of 383 Lafayette Street, New York, New York and SAMUEL G. STAFF, of 415 Fifth Avenue, New York, New York, (hereinafter jointly called "LESSEE").

* * * * *

Any additional time over and above the corresponding loading periods for each vessel that LESSEE may require for loading the vessel and that GRANCOLOMBIANA may grant to LESSEE will be paid by LESSEE to GRANCO-

\$75—

LOMBIANA at the rate of U. S. ~~\$100.00~~ per hour or fraction thereof.

* * * * *

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 16

THIS AGREEMENT made and entered into this 22nd day of May, 1957, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation, with its principal place of business in the City of Bogota, Republic of Colombia, South America, hereinafter called "GRANCOLOMBIANA", acting through its duly authorized agent, the North American Division of TRANSPORTADORA GRANCOLOMBIANA LTDA., a Colombian Limited Liability Corporation, authorized to do business in the State of New York, U. S. A., having its office at 52 Wall Street, New York, New York, and PANAMA ECUADOR SHIPPING CORPORATION, a Panamanian corporation with its principal place of business in the City of Panama, Republic of Panama, hereinafter called "LESSEE"

* * * * *

[fol. 437] 6. In the event that Grancolombiana shall increase the rate of hire during the third year of this agreement over and above the rate of hire hereinabove stated in Paragraph 2 for the said third year, the Lessee shall have the right to cancel this agreement during the third year hereof, provided that the Lessee notifies Grancolombiana, in writing, by registered mail, of such cancellation within thirty (30) days after receipt of notification of the increased rate of hire.

* * * * *

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 20

GM-09808

New York, June 19, 1958

Panama Ecuador Shipping Corp.
22 East 44th Street
New York 3, New York
Attention: Mr. Jack Friedlander

Gentlemen:

We herein confirm agreement reached with you through conversations held in our offices between the undersigning General Manager of Flota Mercante Grancolombiana and your Mr. Staff, Mr. Morey and Mr. Friedlander, regarding the utilization and hire of the refrigerated chambers of the vessels in the run Guyaquil/Philadelphia in relation to the standing agreement signed between Panama Ecuador Shipping Corp. and Flota Mercante Grancolombiana.

For the sailings from Ecuador following the one made by the "CIUDAD DE TUNJA" on June 3rd, with which the 10 weeks of special rates granted you by Flota Mercante Grancolombiana, as indicated in our letters ACC-06592 of April 28th and GM-07473 of May 13th expire, up to the one that will be made by the "MANUEL MEJIA" on or about June 23rd, the above special rates or conditions were extended as follows:

[fol. 438] For the "CIUDAD DE MEDELLIN" that sailed from Ecuador on June 9th and the "CIUDAD DE IBAGUE" that sailed on June 15th, a minimum hire of \$8,000.00 for loading up to 6,500 stems will apply, charging you at a rate of \$1.25 per each additional stem carried over the 6,500. For the "MANUEL MEJIA" scheduled to sail from Ecuador about June 23rd, a minimum hire of \$9,000.00 was agreed upon for loading up to 8,000 stems

with a charge of \$1.10 per each additional stem that be carried over the 8,000 stems mentioned.

All the other terms and conditions of the agreement as modified or confirmed in mentioned letters will remain in full force and effect.

In regard to the modifications that will take effect for the year starting on July 1, 1958 we have submitted same for the approval of the Board of Directors of Flota, and upon confirmation we shall prepare the necessary addendum to the standing contract for execution.

Your very truly,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ALVARO DIAZ S.
General Manager

JJB:dp

cc: Comptroller
Claims

CONSOLO BANANA PURCHASE AND SALE EXPERIENCE

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(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolo Stems Shipped	(6) Cost in Suores	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
147	Santa Isabel	11/4/55	11/14/55	4960	14,9178.25	17.30	\$ 9,612.15	4923	351,920	\$19,307.76	\$18,008.83	\$ 8,396.68	\$1.706
148	Santa Ines	11/7/55	11/17/55	5760	169,247.23	17.30	10,931.75	5675	377,735	18,819.99	17,692.51	6,760.76	1.191
149	Santa Luisa	11/11/55	11/21/55	5250	157,088.14	17.30	10,127.20	5181	384,830	21,756.90	20,770.46	10,643.26	2.054
150	Santa Cecelia	11/19/55	11/28/55	5000	150,393.98	17.30	9,690.40	4971	362,800	19,718.51	17,945.39	8,254.99	1.661
151	Santa Maria	11/25/55	12/5/55	4120	124,353.04	17.30	8,009.66	4039	291,410	13,562.46	11,998.88	3,989.22	.988
152	Santa Olivia	11/26/55	12/7/55	6410	193,887.06	17.30	12,485.64	6164	428,455	14,994.12	14,046.91	1,561.27	.253
153	Santa Margarita	12/2/55	12/12/55	4050	127,345.45	17.35	8,162.63	3929	302,090	14,181.80	13,512.50	5,349.87	1.362
154	Santa Barbara	12/9/55	12/19/55	2260	74,835.02	17.35	4,772.42	2222	173,940	8,218.15	6,831.42	2,059.00	.927
155	Santa Isabel	12/16/55	12/27/55	3870	118,726.38	17.35	7,629.29	3832	310,290	13,758.46	11,937.19	4,307.90	1.124
156	Santa Luisa	12/24/55	1/3/56	4200	121,465.19	17.35	7,854.19	4133	342,790	17,341.20	15,844.68	7,990.49	1.933
157	Santa Ines	12/26/55	1/5/56	3080	94,158.05	17.35	6,052.74	2997	247,570	13,511.48	12,880.23	6,827.49	2.278
158	Santa Cecelia	1/1/56	1/12/56	3820	115,417.83	17.39	7,424.53	3737	311,400	20,308.76	18,734.01	11,309.48	3.026
159	Santa Maria	1/7/56	1/17/56	4240	128,774.07	17.39	8,279.15	4152	349,020	24,376.60	23,013.52	14,734.37	3.549
160	Santa Margarita	1/13/56	1/23/56	4490	131,636.30	17.39	8,495.28	4452	388,855	27,757.26	26,570.06	18,074.78	4.060
161	Santa Olivia	1/15/56	1/25/56	5040	152,923.40	17.39	9,832.77	4901	412,250	29,764.38	29,006.97	19,174.20	3.912
162	Santa Barbara	1/20/56	1/30/56	3950	119,137.80	17.39	7,665.24	3840	321,640	23,541.90	22,656.01	14,990.77	3.904
163	Santa Isabel	1/27/56	2/6/56	4200	128,765.89	17.39	8,270.44	4112	344,150	24,918.39	23,656.40	15,385.96	3.742
164	Santa Luisa	2/3/56	2/13/56	4970	153,034.00	17.55	9,803.09	4910	384,110	27,361.13	26,210.45	16,407.36	3.342
165	Santa Rita	2/5/56	2/15/56	4360	133,806.86	17.55	8,574.58	4227	314,470	21,927.55	20,954.89	12,380.31	2.929
166	Santa Ines	2/11/56	2/23/56	6680	213,318.11	17.55	13,610.78	6414	502,820	29,167.94	27,134.54	13,523.76	2.108
167	Santa Cecelia	2/12/56	2/21/56	4750	146,990.28	17.55	9,410.77	4686	352,820	24,184.75	22,627.14	13,216.37	2.820
168	Santa Maria	2/17/56	2/27/56	3670	114,902.60	17.55	7,347.03	3617	289,990	18,778.90	17,447.36	10,100.33	2.792
169	Santa Margarita	2/24/56	3/5/56	5130	159,395.63	17.55	10,200.45	5030	396,810	22,586.80	21,299.16	11,098.71	2.207
170	Santa Barbara	3/2/56	3/12/56	5090	160,046.28	17.66	10,212.65	4993	395,130	19,758.00	18,312.64	8,099.99	1.622
171	Santa Olivia	3/5/56	3/15/56	5620	172,064.12	17.66	11,012.91	5576	429,765	18,392.81	16,967.34	5,954.43	1.068
172	Santa Isabel	3/10/56	3/20/56	4810	152,874.37	17.66	9,743.28	4715	391,580	16,904.70	15,329.51	5,586.23	1.185
173	Santa Luisa	3/16/56	3/26/56	4060	128,252.46	17.66	8,179.61	3983	325,010	16,298.49	14,787.73	6,608.12	1.659
174	Santa Cecelia	3/24/56	4/3/56	4290	134,861.47	17.66	8,605.81	4152	354,340	17,187.50	15,862.31	7,256.50	1.748
175	Santa Rita	3/25/56	4/5/56	2060	68,529.79	17.66	4,345.93	2069	174,035	8,024.16	7,421.65	3,075.72	1.487
176	Santa Maria	3/31/56	4/9/56	4570	144,692.29	17.66	9,225.74	4492	379,340	17,669.85	16,819.09	7,593.35	1.690

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Suores per stem; Official rate (15.00 Suores Per Dollar) Applied to First 22.50 Suores Per Stem.

CONSOLO BANANA PURCHASE AND SALE EXPERIENCE

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Conso Stems Shipped	(9) Stems Out-Turn Count
	*	*	*	*	***
9	Santa Margarita	8/24/57	9/3/57	4317	4170
10	Santa Barbara	8/31/57	9/10/57	4710	4533
11	Santa Olivia	9/6/57	9/16/57	5346	5278
12	Santa Luisa	9/7/57	9/17/57	3851	3741
13	Santa Isabel	9/14/57	9/24/57	4744	4655
14	Santa Rita	9/20/57	9/30/57	4486	4299
15	Santa Cecelia	9/21/57	10/1/57	5036	4819
16	Santa Maria	9/27/57	10/9/57	4892	4829
17	Santa Elisa	10/4/57	10/14/57	5810	5701
18	Santa Margarita	10/5/57	10/15/57	4752	4693
19	Santa Ines	10/11/57	10/21/57	6132	6109
20	Santa Olivia	10/26/57	11/4/57	5405	5348
21	Santa Catalina	11/2/57	11/11/57	6520	6496
22	Santa Rita	11/12/57	11/21/57	5700	5551
23	Santa Teresa	11/16/57	11/25/57	5764	5602
24	Santa Elisa	11/23/57	12/3/57	6280	6254
25	Santa Ines	11/28/57	12/9/57	6466	6334
26	Santa Ana	12/7/57	12/16/57	5407	5348
27	Santa Olivia	12/14/57	12/23/57	5530	5409
28	Santa Catalina	12/21/57	12/30/57	4023	3980
29	Santa Rita	12/30/57	1/9/58	5526	5416
	*	*	*	*	***

CONSULO BANANA PURCHASE AND SALE EXPERIENCE

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(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consulo Stems Shipped	(6) Cost in Suores	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
30	Santa Teresa	1/6/58	1/16/58	5038	158,683.57	16.32	\$10,334.49	4984	398,640	\$27,175.62	\$26,105.59	\$15,771.10	\$3.164
31	Santa Elisa	1/13/58	1/22/58	5844	178,328.80	16.32	11,636.02	5700	454,515	31,437.69	30,545.82	18,909.80	3.318
32	Santa Ines	1/20/58	1/29/58	6174	186,744.52	16.32	12,191.73	6169	485,840	33,212.34	31,533.97	19,342.24	3.135
33	Santa Ana	1/27/58	2/6/58	4943	161,254.64	16.32	10,480.50	4861	398,960	23,892.72	22,193.59	11,713.09	2.410
34	Santa Olivia	2/2/58	2/12/58	4762	151,761.99	16.30	9,880.23	4689	369,835	19,840.60	18,647.99	8,767.76	1.870
35	Santa Catalina	2/7/58	2/18/58	5828	185,332.43	16.30	12,067.30	5808	439,935	19,715.86	18,555.92	6,488.62	1.117
36	Santa Rita	2/17/58	2/26/58	5303	166,619.65	16.30	10,856.47	5186	404,625	19,732.73	18,388.21	7,531.74	1.452
37	Santa Elisa	3/3/58	3/13/58	5202	173,768.56	16.50	11,240.79	5166	406,580	25,753.47	23,142.39	11,901.60	2.304
38	Santa Ines	3/9/58	3/20/58	6138	197,363.91	16.50	12,798.45	6076	430,105	26,821.85	24,564.72	11,766.27	1.937
39	Santa Olivia	3/20/58	4/2/58	6173	193,200.73	16.50	12,550.91	6104	464,160	22,899.70	20,729.55	8,178.64	1.340
40	Santa Catalina	3/29/58	4/7/58	5902	188,140.85	16.50	12,207.29	5778	448,010	19,392.25	17,290.66	5,083.37	.880
41	Santa Rita	4/7/58	4/17/58	5800	186,691.68	17.00	12,005.39	5660	455,520	19,794.78	17,657.49	5,652.10	.999
42	Santa Elisa	4/22/58	5/1/58	4501	141,172.28	17.00	9,098.55	4408	382,510	22,195.83	21,285.91	12,187.36	2.765
43	Santa Ines	4/28/58	5/7/58	4631	124,690.22	17.00	8,151.95	4617	374,565	23,172.12	20,156.75	12,004.80	2.600
44	Santa Rita	5/10/58	5/21/58	5664	162,872.79	16.82	10,602.59	5421	438,900	20,908.32	19,561.16	8,958.57	1.653
45	Santa Olivia	5/16/58	5/26/58	5603	161,851.63	16.82	10,531.98	5453	432,930	17,362.51	15,645.46	5,113.48	.938
46	Santa Catalina	5/24/58	6/4/58	5470	152,594.51	16.82	9,960.02	5294	434,140	18,104.27	16,414.74	6,454.72	1.219
47	Santa Teresa	6/1/58	6/11/58	4013	113,378.10	16.65	7,406.02	3945	327,535	17,262.64	15,864.30	8,458.28	2.144
48	Santa Rita	6/9/58	6/18/58	5330	149,384.73	16.65	9,764.35	5197	427,170	23,839.54	21,871.39	12,107.04	2.330
49	Santa Elisa	6/14/58	6/24/58	4975	139,069.38	16.65	9,092.04	4828	388,600	21,219.76	18,819.42	9,727.38	2.015
50	Santa Ines	6/21/58	7/1/58	5590	154,396.07	16.65	10,103.98	5216	411,280	20,205.46	18,642.29	8,538.31	1.637
51	Santa Olivia	6/29/58	7/8/58	5710	160,684.04	16.65	10,499.48	5504	444,110	21,820.01	20,128.01	9,628.53	1.749
52	Santa Catalina	7/15/58	7/24/58	5875	174,672.34	16.89	11,327.98	5706	459,895	41,252.92	38,077.57	26,749.69	4.688
53	Santa Ines	7/20/58	7/30/58	6110	184,393.20	16.89	11,542.87	6131	471,660	45,435.25	42,280.37	30,337.50	4.948
54	Santa Ana	7/29/58	8/7/58	4368	129,189.11	16.89	8,382.02	4133	316,525	22,076.01	20,208.76	11,826.74	2.862
55	Santa Rita	8/3/58	8/13/58	6500	209,521.57	16.89	13,446.10	6609	467,075	27,347.26	25,383.79	11,887.69	1.799
56	Santa Olivia	8/12/58	8/21/58	5709	184,198.38	16.89	11,864.03	5896	423,190	20,672.89	18,863.32	6,999.29	1.187
57	Santa Ines	8/17/58	8/28/58	5465	184,764.97	16.89	11,856.62	5497	379,320	15,988.28	15,130.73	3,274.11	.596
58	Santa Elisa	8/24/58	9/3/58	6315	199,201.05	16.89	12,448.76	6219	456,260	24,792.80	23,109.62	10,610.86	1.706
59	Santa Rita	8/31/58	9/10/58	5850	180,018.10	16.89	11,640.19	5899	430,340	30,463.02	28,196.12	16,555.93	2.807
60	Santa Ines	9/13/58	9/23/58	6130	187,201.18	16.90	12,110.75	6065	454,320	33,709.32	31,475.40	19,364.65	3.193
61	Santa Catalina	9/30/58						6193	454,860	38,793.42			

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Suores per stem; Official rate (15.00 Suores Per Dollar) Applied to First 22.50 Suores Per Stem.

EXHIBIT No. 42

COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

 FMB Docket 827
 Exhibit 2
 Page 1 of 2

I n d e x	(1) Voy. No.	(2) Ship Name	(3) Date Sailed Guayaquil 1/	(4) Date Arrived Phila- delphia	(5) No. of Stems Aboard	(6) Freight paid (Dollars)	(7) Sailing Guay. Nearest Consolo Ship	(8) Consolo Profit/Stem Before Stev. and Freight	(9) Total Profit Before Stev. & Freight (5) x (8)	(10) Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	(11) Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	(12) Net Profit at 35¢ Stev. (9)-(6)-(10)	(13) 1/3 Profit at 35¢ Stev. (12) ÷ 3	(14) Net Profit at 48.8¢ Stev. (9)-(6)-(11)	(15) 1/3 Profit at 48.8¢ Stev. (14) ÷ 3
1	47-W	Medellin	11/5/55	11/15/55	12,100	\$13,000.00	11/4/55	\$1.706	\$20,642.60	\$4,235.00	\$5,904.80	\$3,407.60	\$1,135.86	\$1,737.80	\$ 579.26
2	61-N	Quito	11/16/55	11/27/55	9,000	10,000.00	11/19/55	1.661	14,949.00	3,150.00	4,392.00	1,799.00	599.66	557.00	185.66
3	22-W	Ibague	11/19/55	11/29/55	13,220	14,500.00	11/19/55	1.661	21,958.42	4,627.00	6,451.36	2,831.42	943.80	1,007.06	335.68
4	22-W	Cali	11/26/55	12/7/55	12,643	14,500.00	11/26/55	.253	3,196.68	4,425.05	6,169.78	(15,726.37)	(5,242.12)	(17,471.10)	(5,823.70)
5	75-W	Manizales	12/2/55	12/12/55	6,110	7,000.00	12/2/55	1.362	8,321.82	2,138.50	2,981.68	(816.68)	(272.22)	(1,659.86)	(553.28)
6	48-W	Medellin	12/10/55	12/21/55	8,160	8,160.00	12/9/55	.927	7,564.32	2,856.00	3,982.08	(3,451.68)	(1,150.56)	(4,577.76)	(1,525.92)
7	23-W	Ibague	12/26/55	1/9/56	8,912	9,300.00	12/26/55	2.278	20,301.54	3,119.20	4,349.06	7,882.34	2,627.44	6,652.48	2,217.49
8	23-W	Cali	1/4/56	1/15/56	8,446	9,300.00	1/1/56	3.026	25,557.60	2,956.10	4,121.65	13,301.50	4,433.83	12,135.95	4,045.31
9	76-W	Manizales	1/9/56	1/20/56	5,252	5,252.00	1/7/56	3.549	18,639.35	1,838.20	2,562.98	11,549.15	3,849.71	10,824.37	3,608.12
10	49-W	Medellin	1/16/56	1/26/56	11,895	13,000.00	1/15/56	3.912	46,533.24	4,163.25	5,804.76	29,369.99	9,789.99	27,728.48	9,242.82
11	63-W	Quito	1/23/56	2/2/56	8,857	10,000.00	1/20/56	3.904	34,577.73	3,099.95	4,322.22	21,477.78	7,159.26	20,255.51	6,751.83
12	24-W	Ibague	1/31/56	2/9/56	12,205	14,500.00	2/3/56	3.342	40,789.11	4,271.75	5,956.04	22,017.36	7,339.12	20,333.07	6,777.69
13	24-W	Cali	2/5/56	2/15/56	13,500	14,500.00	2/5/56	2.929	39,541.50	4,725.00	6,588.00	20,316.50	6,772.16	18,453.50	6,151.16
14	77-W	Manizales	2/12/56	2/23/56	6,141	7,000.00	2/12/56	2.820	17,317.62	2,149.35	2,996.81	8,168.27	2,722.75	7,320.81	2,440.27
15	50-W	Medellin	2/20/56	3/1/56	12,493	13,000.00	2/17/56	2.792	34,890.46	4,372.55	6,096.58	17,507.91	5,835.97	15,783.88	5,261.29
16	64-W	Quito	2/27/56	3/8/56	9,170	10,000.00	2/24/56	2.207	20,238.19	3,209.50	4,474.96	7,028.69	2,342.89	5,763.23	1,921.07
17	25-W	Ibague	3/5/56	3/15/56	12,150	14,500.00	3/5/56	1.068	12,976.20	4,252.50	5,929.20	(5,776.30)	(1,925.43)	(7,453.00)	(2,484.33)
18	25-W	Cali	3/11/56	3/22/56	13,430	14,500.00	3/10/56	1.185	15,914.55	4,700.50	6,553.84	(3,285.95)	(1,095.31)	(5,139.29)	(1,713.09)
19	78-W	Manizales	3/17/56	3/27/56	5,786	7,000.00	3/16/56	1.659	9,598.97	2,025.10	2,823.57	573.87	191.29	(244.60)	(74.86)
20	51-W	Medellin	3/23/56	4/3/56	10,086	13,000.00	3/24/56	1.748	17,630.33	3,530.10	4,921.97	1,100.23	366.74	(291.64)	(97.21)
21	26-W	Ibague	4/8/56	4/17/56	11,092	11,092.00	4/6/56	2.181	24,191.65	3,882.20	5,412.90	9,217.45	3,072.48	7,686.75	2,562.25
22	26-W	Cali	4/14/56	4/24/56	10,567	10,567.00	4/13/56	3.557	37,586.82	3,698.45	5,156.70	23,321.37	7,773.79	21,863.12	7,287.70
23	79-W	Manizales	4/22/56	5/2/56	4,900	7,000.00	4/20/56	3.807	18,654.30	1,715.00	2,391.20	9,959.30	3,313.10	9,263.10	3,087.70
24	52-W	Medellin	4/28/56	5/8/56	11,250	13,000.00	4/27/56	4.133	46,496.25	3,937.50	5,490.00	29,558.75	9,852.91	28,006.25	9,335.41
25	27-W	Ibague	5/6/56	5/17/56	10,020	14,500.00	5/5/56	4.191	41,993.82	3,507.00	4,889.76	23,986.82	7,995.60	22,604.06	7,534.68
26	66-W	Quito	5/14/56	5/24/56	7,831	10,000.00	5/11/56	3.894	30,493.91	2,740.85	3,821.53	17,753.06	5,917.68	16,672.38	5,557.46
27	27-W	Cali	5/19/56	5/29/56	9,011	14,500.00	5/18/56	3.690	33,250.59	3,153.85	4,397.37	15,596.74	5,198.91	14,353.22	4,784.40
28	80-W	Manizales	5/27/56	6/8/56	5,613	7,000.00	5/25/56	2.990	16,782.87	1,964.55	2,739.14	7,818.32	2,606.10	7,043.73	2,347.91
29	53-W	Medellin	6/3/56	6/12/56	8,521	13,000.00	6/2/56	2.303	19,623.86	2,982.35	4,158.25	3,641.51	1,213.83	2,465.61	821.87
30	28-W	Ibague	6/8/56	6/20/56	11,290	14,500.00	6/8/56	2.253	25,436.37	3,951.50	5,509.52	6,984.87	2,328.29	5,426.95	1,808.95
31	67-W	Quito	6/16/56	6/26/56	7,903	10,000.00	6/15/56	1.647	13,016.24	2,766.05	3,856.66	250.19	83.39	(840.42)	(280.14)
32	28-W	Cali	6/24/56	7/4/56	8,795	14,500.00	6/22/56	1.004	8,830.18	3,078.25	4,291.96	(8,748.07)	(2,916.02)	(9,961.78)	(3,320.59)

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.

[fol. 443]

COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

FMB Docket 827
Exhibit 42
Page 5 of 5

I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Phila- delphia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Consolo Ship	Consolo Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5) x (8)	Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12) ÷ 3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
129	11-N	Tunja		6/13/58	6,275	\$8,080.00	6/11/58 3/	\$2.144	\$13,453.60	\$2,196.25	\$3,062.20	\$3,177.35	\$1,059.11	\$2,311.40	\$770.46
130	72-N	Medellin		6/20/58	4,898	8,080.00	6/18/58 3/	2.330	11,412.34	1,714.30	2,390.22	1,618.04	539.34	942.12	314.04
131	48-N	Ibague		6/26/58	5,956	8,080.00	6/24/58 3/	2.015	12,001.34	2,084.60	2,906.53	1,836.74	612.24	1,014.81	338.27
132	7-N	Mejia		7/3/58	6,284	9,090.00	7/1/58 3/	1.637	10,286.91	2,199.40	3,066.59	(1,002.49)	(334.16)	(1,869.68)	(623.22)
133	4-N	Cartagena de Indias		7/9/58	9,728	9,825.28	7/8/58 3/	1.749	17,014.27	3,404.80	4,747.26	3,784.19	1,261.39	2,441.73	813.91
134	2-N	Pasto		7/18/58	11,800	11,918.00	7/24/58 3/	4.688	55,318.40	4,130.00	5,758.40	39,270.40	13,090.13	37,642.00	12,547.33
135	12-N	Tunja		7/25/58	11,216	11,328.16	7/24/58 3/	4.688	52,580.61	3,925.60	5,473.41	37,326.85	12,442.28	35,779.04	11,926.34
136	3-N	Barranquilla		8/1/58	13,463	14,140.00	7/30/58 3/	4.948	66,614.92	4,712.05	6,569.94	47,762.87	15,920.95	45,904.98	15,301.66
137	49-N	Ibague		8/8/58	12,689	14,140.00	8/7/58 3/	2.862	36,315.92	4,441.15	6,192.23	17,734.77	5,911.59	15,983.69	5,327.89
138	8-N	Mejia		8/15/58	13,511	14,140.00	8/13/58 3/	1.799	24,306.29	4,728.85	6,593.37	5,437.44	1,812.48	3,572.92	1,190.97
139	5-N	Cartagena		8/21/58	13,161	14,140.00	8/21/58 3/	1.187	15,622.11	4,606.35	6,422.57	(3,124.24)	(1,041.41)	(4,940.46)	(1,646.82)
140	3-N	Pasto		8/28/58	7,312	7,385.12	8/28/58 3/	.596	4,357.95	2,559.20	3,568.26	(5,586.37)	(1,862.12)	(6,595.43)	(2,198.47)
141	13-N	Tunja		9/5/58	9,478	9,572.78	9/3/58 3/	1.706	16,169.47	3,317.30	4,625.26	3,279.39	1,093.13	1,971.43	657.14
142	4-N	Barranquilla		9/11/58	10,596	10,701.96	9/10/58 3/	2.807	29,742.97	3,708.60	5,170.85	15,332.41	5,110.80	13,870.16	4,623.38
143	50-N	Ibague		9/18/58	11,139	11,250.39	9/23/58 3/	3.193	35,566.83	3,898.65	5,435.83	20,417.79	6,805.93	18,880.61	6,293.53
144	9-N	Mejia		9/25/58	9,474	9,568.74	9/23/58 3/	3.193	30,250.48	3,315.90	4,623.31	17,365.84	5,788.61	16,058.43	5,352.81
145	6-N	Cartagena de Indias		10/2/58	11,829	14,140.00									
146	4-N	Pasto		10/10/58	12,814	14,140.00									
147	14-N	Tunja		10/16/58	13,540	14,140.00									
148	5-N	Barranquilla		10/24/58	14,003	14,140.00									

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.
2/ Consolo arrival date @ N. Y.

EXHIBIT No. 54

[fol. 444]

BANANA FREIGHTING AGREEMENT - FREIGHTER VESSELS

Banana Freight Agreement entered into the 2nd day of May, 1958, by and between GRACE LINE INC., hereinafter called "Grace" and BANANA DISTRIBUTORS INC., hereinafter called the "Shipper".

* * *

3) Freight will be computed at the rate of \$36.00 U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight is considered earned, bananas loaded or not, vessel lost or not lost. For the use of the refrigerated space specified in Paragraph One hereof, the Shipper guarantees to Grace a minimum payment against freight charges in the amount of \$0.3037 U.S. Currency per cubic foot of space made available to the Shipper, used or not used; such minimum freight payment per type of vessel totals:

SANTA INES/RITA	\$1950.
SANTA OLIVIA/ELISA	\$1800.
SANTA CATALINA	\$1800.
SANTA TERESA	\$2100.
SANTA ANA	\$2150.

Such minimum freight is to be paid by the Shipper in New York, N. Y., within forty-eight hours after the vessel has reported for loading. Certified outturn weight certificates are to be furnished by the Shipper to Grace in New York within one week after discharge of each vessel, and any additional freight charges over and above the minimum freight payment are to be remitted by the Shipper to Grace in New York within forty-eight hours after date of billing. In the event that vessel or cargo is lost after reporting for loading and certified outturn weight certificates are not available, freight will be paid on the basis of the certified outturn weight certificate of the last banana shipment of the Shipper carried by Grace preceding such loss of vessel or cargo, or on the basis of the minimum freight payment required herein, whichever is greater.

* * *

Copia de carta de FLOTA MERCANTE GRANCOLOMBIANA, S.A.-Bogota

G.G. 14864

Bogota, July 8, 1957

Andes Fruit & Produce Corp.
19 Rector Street
NEW YORK 6, N. Y.

Gentlemen:

We acknowledge receipt of your letter dated June 8, 1957 requesting the allocation of refrigerated space on our vessels which ply between Ecuador and Philadelphia.

We wish to advise you that we recently called for bids from shippers that showed an interest in connection with this space, and after receiving the various bids we allocated the space under a forward booking arrangement to the successful bidder.

We have taken note of your application for space in our vessels, and we will be happy to advise you upon termination of the present contract, so that you may favor us with your bid in the event you decide to do so. In the interim, we would appreciate it if you would furnish us with the following information, so that we may become acquainted with your demands.

- A. Number of bananas sought to be shipped.
- B. Frequency of shipment.
- C. Name of plantations from which the bananas will originate.
- D. Names of officers, stockholders and directors of shipping and receiving corporations.
- E. Financial statements of both corporations duly certified by Public Accountants.
- F. Ports for which bananas will be destined.
- G. Generally, any other information required, which you deem necessary.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

POLICARPO GUTIERREZ E.
Gerente General Encargado

PGE/lr.

Copia de carta de FLOTA MERCANTE GRANCOLOMBIANA, S.A.-Bogota

G.G. 14865

Bogota, D.E. July 8, 1957

WM. Turino Company, Inc.
130 Park Place,
NEW YORK 7, N. Y.

Gentlemen:

We acknowledge receipt of your letter dated June 6, 1957 requesting the allocation of refrigerated space on our vessels which ply between Ecuador and Philadelphia.

We wish to advise you that we recently called for bids from shippers that showed an interest in connection with this space, and after receiving the various bids we allocated the space under a forward booking arrangement to the successful bidder.

We have taken note of your application for space in our vessels, and we will be happy to advise you upon termination of the present contract so that you may favor us with your bid, in the event you decide to do so. In the interim we would appreciate it if you would furnish us with the following information, so that we may become acquainted with your demands:

- A. Number of bananas sought to be shipped.
- B. Frequency of shipment.
- C. Name of plantations from which the bananas will originate.
- D. Names of officers, stockholders and directors of shipping and receiving corporations.
- E. Financial statements of both corporations duly certified by Public Accountants.
- F. Ports for which bananas will be destined.
- G. Generally, any other information required which you deem necessary.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

POLICARPO GUTIERREZ E.
Gerente General Encargado

PGE/lr.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

SCHEDULE OF FREIGHTS COLLECTED ON BANANA IMPORTS INTO UNITED STATES
NORTH ATLANTIC PORTS IN VESSELS OF FLOTA MERCANTE GRANCOLOMBIANA, S.A.
AFTER "CDAD. DE BARRANQUILLA" VOY. 5 NORTH

<u>Vessel</u>	<u>Voyage</u>	<u>Number Of Stems Carried</u>	<u>Freight</u>	<u>Date Sailed From Ecuador</u>	<u>Date Arrived In Phila.</u>
"CD. DE IBAGUE"	51-N	12,680	\$14,140.00	10/19/58	10/30/58
"MANUEL MEJIA"	10-N	14,104	14,245.04	10/27/58	11/7/58
"CARTAGENA DE INDIAS"	7-N	13,363	14,140.00	11/3/58	11/14/58
"CD. DE PASTO"	5-N	15,094	15,150.00	11/9/58	11/20/58
"CD. DE TUNJA"	15-N	13,006	14,140.00	11/17/58	11/28/58
"CD. DE BARRANQUILLA"	6-N	14,695	14,841.95	11/23/58	12/5/58
"CD. DE IBAGUE"	52-N	12,773	14,140.00	12/1/58	12/11/58
"MANUEL MEJIA"	11-N	12,002	14,140.00	2/7/58	12/18/58
"CARTAGENA DE INDIAS"	8-N	9,386	9,479.86	12/14/58	12/25/58
"CD. DE PASTO"	6-N	9,391	9,484.91	12/21/58	1/1/59
"CD. DE TUNJA"	16-N	12,610	14,140.00	12/28/58	1/9/59
"CD. DE BARRANQUILLA"	7-N	12,151	14,140.00	1/5/59	1/16/59
"CD. DE IBAGUE"	53-N	12,088	14,140.00	1/12/59	1/22/59
"MANUEL MEJIA"	12-N	13,795	14,140.00	1/19/59	1/30/59
"CARTAGENA DE INDIAS"	9-N	13,380	14,140.00	1/25/59	2/6/59
"CD. DE PASTO"	7-N	12,357	14,140.00	2/1/59	2/13/59
"CD. DE GUAYAQUIL"	2-N	7,845	8,080.00	1/28/59	2/5/59
"CD. DE TUNJA"	17-N	13,020	14,140.00	2/8/59	2/20/59
"CD. DE BARRANQUILLA"	8-N	13,449	14,140.00	2/15/59	2/26/59
"CD. DE IBAGUE"	54-N	12,322	14,140.00	2/23/59	3/6/59
"MANUEL MEJIA"	13-N	14,029	14,169.29	3/1/59	3/11/59
"CD. DE GUAYAQUIL"	3-N	14,105	14,246.05	3/8/59	3/19/59
"CD. DE PASTO"	8-N	13,503	14,140.00	3/16/59	3/26/59*
"CARTAGENA DE INDIAS"	10-N	13,225	14,140.00	3/22/59	4/2/59
"CD. DE TUNJA"	18-N	12,485	14,140.00	3/30/59	4/8/59
"CD. DE BARRANQUILLA"	9-N	12,490	14,140.00	4/5/59	4/16/59
"CD. DE GUAYAQUIL"	4-N	12,367	14,140.00	4/12/59	4/24/59
"MANUEL MEJIA"	14-N	13,144	14,140.00	4/19/59	5/1/59
"CD. DE PASTO"	9-N	13,222	14,140.00	4/26/59	5/7/59
"CARTAGENA DE INDIAS"	11-N	13,311	14,140.00	5/4/59	5/15/59
"CD. DE TUNJA"	19-N	13,595	14,140.00	5/10/59	5/21/59
"CD. DE BARRANQUILLA"	10-N	12,602	14,140.00	5/17/59	5/29/59
"CD. DE GUAYAQUIL"	5-N	13,348	14,140.00	5/24/59	6/25/59
"MANUEL MEJIA"	15-N	9,294	9,393.00	5/31/59	6/11/59
"CD. DE PASTO"	10-N	8,047	8,127.47	6/8/59	6/18/59
"CARTAGENA DE INDIAS"	12-N	12,201	14,140.00	6/15/59	6/26/59
"CD. DE TUNJA"	20-N	11,830	14,140.00	6/21/59	7/2/59
"CD. DE BARRANQUILLA"	11-N	10,000	10,100.00	6/29/59	7/10/59*
"CD. DE GUAYAQUIL"	6-N	7,920	10,801.95	7/6/59	7/25/59
"MANUEL MEJIA"	16-N	6,700	10,801.95	7/12/59	7/24/59
"CD. DE PASTO"	11-N	7,458	10,801.95	7/20/59	7/31/59
"CARTAGENA DE INDIAS"	13-N	11,015	12,967.14	7/26/59	8/7/59
"CD. DE TUNJA"	21-N	10,740	12,619.95	8/2/59	8/14/59
"CD. DE BARRANQUILLA"	12-N	12,087	14,320.54	8/10/59	8/21/59
"DE. DE GUAYAQUIL"	7-N	11,301	13,328.21	8/17/59	8/27/59
"MANUEL MEJIA"	17-N	10,846	12,753.78	8/29/59	10/16/59
"CD. DE PASTO"	12-N	9,194	10,801.95	8/31/59	9/10/59

* Discharged at Baltimore due to strike in Philadelphia.

[fol. 448]

BEFORE THE FEDERAL MARITIME BOARD
EXHIBIT No. 111

CONSOLO BANANA PURCHASE AND SALES EXPERIENCE

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
Shipment Number	Ship Name	Date Sailed Guayaquil	Date Arrived New York	Consolo Stems Shipped	Average Cost in Sucres per Stem*	Free Market Exchange Rate**	Cost in Dollars	Stems Out-turn Count	Out-turn Weight (Pounds)	Gross Sales (Dollars)	Net Sales (Dollars)	Profit be- fore Steve. and Freight	Profit per Stem Sold before Steve. and Freight
61	Santa Catalina	9/20/58	9/30/58	5908	3365	16.92	\$12,755.27	6193	454860	\$38,793.42	\$36,549.14	\$23,793.87	3.843
62	Santa Rita	9/28/58	10/8/58	6247	3134	16.92	12,634.30	6326	459940	39,169.47	37,020.84	24,386.54	3.855
63	Santa Elisa	10/3/58	10/14/58	6336	3123	16.69	12,818.15	6291	452020	38,028.64	35,190.21	22,372.06	3.556
64	Santa Ines	10/13/58	10/23/58	5624	3377	16.69	12,233.63	6184	457465	38,613.20	36,232.43	23,998.90	3.881
65	Santa Olivia	10/20/58	10/30/58	6224	3152	16.69	12,549.72	6448	455335	38,903.54	36,704.76	24,155.04	3.746
66	Santa Rita	10/20/58	11/6/58	5675	3364	16.69	12,300.36	6217	423860	36,021.31	33,175.92	20,875.56	3.358
67	Santa Ines	11/10/58	11/21/58	6084	3372	16.65	13,225.85	6467	440190	36,314.21	33,292.89	20,067.04	3.103
68	Santa Elisa	11/16/58	11/25/58	6361	3074	16.65	12,695.53	6943	455240	37,360.90	34,153.85	21,458.32	3.091
69	Santa Rita	11/24/58	12/4/58	6466	3338	16.65	13,924.23	6976	471145	30,345.49	28,080.66	14,156.43	2.029
70	Santa Catalina	11/29/58	12/8/58	6381	3153	16.65	13,032.19	6490	427900	24,460.60	22,412.84	9,380.65	1.445
71	Santa Ines	12/7/58	12/18/58	5792	3237	16.67	12,117.34	6059	402045	19,745.06	18,018.76	5,901.42	.974
72	Santa Olivia	12/12/58	12/22/58	3997	3366	16.67	8,671.36	4323	298440	15,661.30	14,476.72	5,805.36	1.343
73	Santa Rita	12/20/58	12/30/58	3841	3316	16.67	8,217.72	4156	290860	17,625.18	16,442.92	8,225.20	1.979
74	Santa Elisa	12/29/58	1/8/59	5618	3339	16.67	12,097.07	5917	418355	28,633.88	26,947.71	14,850.64	2.510
75	Santa Ines	1/4/59	1/15/59	5492	3267	16.75	11,572.55	5554	400830	27,319.62	25,607.53	14,034.98	2.527
76	Santa Catalina	1/9/59	1/19/59	5474	3190	16.75	11,282.97	6243	405620	27,799.78	25,373.44	14,090.47	2.257
77	Santa Rita	1/17/59	1/27/59	5797	3169	16.75	11,876.06	6897	467660	31,158.71	29,084.16	17,208.10	2.495
78	Santa Teresa	1/26/59	2/4/59	5050	3445	16.75	11,177.83	5415	404965	28,096.86	26,391.29	15,213.46	2.810

* Includes Ecuador tax and plastic, rope and paint.

** Free market rate applied to costs in excess of
22.50 sucres per stem; official rate (15 sucres
per dollar) applied to first 22.50 sucres per stem.

[fol. 449]

Exhibit 111

CONSOLO BANANA PURCHASE AND SALES EXPERIENCE

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
Shipment Number	Ship Name	Date Sailed Guayaquil	Date Arrived New York	Consolo Stems Shipped	Average Cost in Sucres per Stem	Free Market Exchange Rate	Cost in Dollars	Stems Out-turn Count	Out-turn Weight (Pounds)	Gross Sales (Dollars)	Net Sales (Dollars)	Profit be- fore Stems and Freight	Profit per Stem Sold before Stems and Freight
79	Santa Ines	1/31/59	2/10/59	5037	33.75	16.75	\$10,938.56	5698	417410	\$28,780.25	\$27,136.10	\$16,197.54	2.843
80	Santa Elisa	2/7/59	2/16/59	5209	36.53	16.97	12,120.06	5776	438995	30,718.49	29,049.44	16,929.38	2.931
81	Santa Rita	2/14/59	2/24/59	5073	34.81	16.97	11,289.44	5211	395730	27,688.98	25,955.71	14,666.27	2.814
82	Santa Ines	2/28/59	3/10/59	5706	35.26	16.97	12,849.43	6004	452910	29,613.88	27,544.14	14,694.71	2.447
83	Santa Teressa	3/8/59	3/19/59	5161	37.41	17.26	12,199.81	5336	422125	24,952.09	24,098.48	11,898.67	2.230
84	Santa Elisa	2/31/59	3/31/59	5285	35.91	17.26	12,033.63	5563	435260	24,020.48	23,399.81	11,366.18	2.043
85	Santa Ines	3/31/59	4/9/59	5055	37.75	17.26	12,048.82	5543	425390	24,503.26	22,352.49	10,303.67	1.859
86	Santa Rita	4/14/59	4/24/59	6160	34.27	17.24	13,445.52	6079	477420	33,951.10	31,983.44	18,537.92	3.050
87	Santa Catalina	4/18/59	4/29/59	5988	34.07	17.24	13,000.63	5907	447100	32,151.95	30,260.70	17,260.07	2.922
88	Santa Elisa	5/2/59	5/11/59	5838	33.07	17.47	12,289.21	5719	436120	30,949.60	29,211.02	16,921.81	2.959
89	Santa Rita	5/10/59	5/20/59	6289	33.12	17.47	13,256.58	6259	475960	30,349.15	29,080.43	15,823.85	2.528
90	Santa Olivia		5/25/59	6187		*	14,044.49	6016	455330	30,515.50	29,029.93	14,985.44	2.491
91	Santa Catalina		6/8/59	5663			12,855.01	5548	462440	29,179.65	27,714.87	14,859.86	2.678
92	Santa Rita		6/16/59	5351			12,146.77	5310	413130	23,591.55	22,094.88	9,948.11	1.873
93	Santa Elisa		6/23/59	6158			13,978.66	5949	446000	21,033.50	20,574.65	6,595.99	1.109
94	Santa Ines		7/1/59	5819			13,209.13	5508	396800	18,064.70	17,509.37	4,300.24	.781
95	Santa Olivia		7/6/59	5015			11,384.05	4893	363081	18,016.36	16,136.12	4,752.07	.971
96	Santa Catalina		7/20/59	4961			11,261.47	4836	366942	18,530.24	16,972.60	5,711.13	1.181
97	Santa Ines		7/30/59	3851			8,741.77	3764	281193	16,596.96	15,796.12	7,054.35	1.874
98	Santa Elisa		8/4/59	5173			11,742.71	5013	359456	22,830.16	22,151.62	10,408.91	2.076
99	Santa Rita		8/12/59	6584			14,945.68	6325	452418	25,745.32	25,416.66	10,470.98	1.655
100	Santa Olivia		8/17/59	5805			13,177.35	5614	394861	22,784.57	22,378.94	9,201.59	1.639
101	Santa Ines		8/26/59	6647			15,088.69	6456	459684	25,381.69	24,540.56	9,451.87	1.464
102	Santa Catalina		8/31/59	6589			14,957.03	6379	451267	24,632.48	24,024.38	9,067.35	1.431
103	Santa Rita		9/9/59	6949			15,774.23	6766	475198	26,911.10	26,545.75	10,771.52	1.592
104	Santa Elisa		9/15/59	5945			13,495.15	5824	404278	28,614.82	28,107.67	14,612.52	2.509
105	Santa Ines		9/23/59	6780			15,390.60	6686	471042	36,189.19	35,516.70	20,126.10	3.010
106	Santa Olivia		9/29/59	6832			15,508.64	6615	480470	36,005.69	35,302.64	19,794.00	2.992

* Computation of costs at rate of \$2.27 per stem shipped
(Shipments 90-106)

BEFORE THE FEDERAL MARITIME BOARD
EXHIBIT No. 112

COMPUTATION OF DAMAGES FOR EACH GRANCOLOMBIANA SAILING [fol. 450]

456

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	Voyage	Ship Name	Date	Date Arrived	Number	Freight	Sailing	Consolo	Total	Total	Net Profit	
Index	Number		Sailed	Philadelphia	of Stems	Paid	Guayaquil	Profit/Stem	Profit	Steve.	after Steve.	1/3 of
			Guayaquil		Aboard	(Dollars)	nearest	before Steve.	before	at \$.451	and Freight	Net
							Consolo Ship	and Freight	S. & F.	per Stem	(9-6-10)	
									(5) x (8)			
145	6-N	Cartagena de Indias		10/2/58	11829	\$14,140.00	9/30/58	3.843	\$45,458.85	\$5,334.88	\$25,983.97	\$8,660.46
146	4-N	Pasto		10/10/58	12814	14,140.00	10/10/58	3.855	49,397.97	5,779.11	29,478.86	9,825.30
147	14-N	Tunja		10/10/58	13540	14,140.00	10/14/58	3.556	48,148.24	6,106.54	27,901.70	9,299.64
148	5-N	Barranquilla		10/24/58	14003	14,140.00	10/23/58	3.881	54,345.64	6,315.35	33,890.29	11,295.63
149	51-N	Ca. de Ibagua	10/19/58	10/30/58	12680	14,140.00	10/20/58	3.746	47,499.28	5,718.68	27,640.60	9,212.61
150	10-N	Manuel Mejia	10/27/58	11/7/58	14104	14,245.04	10/26/58	3.358	47,361.23	6,360.90	26,755.29	8,917.54
151	7-N	Cartagena de Indias	11/3/58	11/14/58	13363	14,140.00	11/10/58	3.103	41,465.39	6,026.71	21,298.68	7,098.85
152	5-N	Ca. de Pasto	11/9/58	11/20/58	15094	15,150.00	11/10/58	3.103	46,836.68	6,807.39	24,879.29	8,292.27
153	15-N	Ca. de Tunja	11/17/58	11/28/58	13006	14,140.00	11/16/58	3.091	40,201.55	5,865.71	20,195.84	6,731.27
154	6-N	Ca. de Barranquilla	11/23/58	12/5/58	14695	14,841.95	11/24/58	2.029	29,816.16	6,627.45	8,346.76	2,782.23
155	52-N	Ca. de Ibagua	12/1/58	12/11/58	12773	14,140.00	11/29/58	1.445	18,456.99	5,760.62	(1,443.63)	(481.21)
156	11-N	Manuel Mejia	12/7/58	12/18/58	12002	14,140.00	12/7/58	.974	11,689.95	5,412.90	(7,862.95)	(2,620.96)
157	8-N	Cartagena de Indias	12/14/58	12/25/58	9386	9,479.86	12/12/58	1.343	12,605.40	4,233.09	(1,107.55)	(369.18)
158	6-N	Ca. de Pasto	12/21/58	1/1/59	9391	9,484.91	12/20/58	1.979	18,584.79	4,235.34	4,864.54	1,621.50
159	16-N	Ca. de Tunja	12/28/58	1/9/59	12610	14,140.00	12/29/58	2.510	31,651.10	5,687.11	11,823.99	3,940.94
160	7-N	Ca. de Barranquilla	1/5/59	1/16/59	12151	14,140.00	1/4/59	2.527	30,705.58	5,480.10	11,085.48	3,694.79
161	53-N	Ca. de Ibagua	1/12/59	1/22/59	12088	14,140.00	1/9/59	2.257	27,282.62	5,451.69	7,690.93	2,563.62
162	12-N	Manuel Mejia	1/19/59	1/30/59	13795	14,140.00	1/17/59	2.495	34,418.53	6,221.55	14,056.98	4,685.19
163	9-N	Cartagena de Indias	1/25/59	2/6/59	13380	14,140.00	1/26/59	2.810	37,597.80	6,034.38	17,423.42	5,807.23
164	7-N	Ca. de Pasto	2/1/59	2/13/59	12357	14,140.00	1/31/59	2.843	35,130.95	5,573.01	15,417.94	5,138.80
165	2-N	Ca. de Guayaquil	1/28/59	2/5/59	7845	8,080.00	1/26/59	2.810	22,044.45	3,538.10	10,426.35	3,475.10
166	17-N	Ca. de Tunja	2/8/59	2/20/59	13020	14,140.00	2/7/59	2.931	38,161.62	5,872.02	18,149.60	6,049.26
167	8-N	Ca. de Barranquilla	2/15/59	2/26/59	13449	14,140.00	2/14/59	2.814	37,845.49	6,065.50	17,639.99	5,879.41
168	54-N	Ca. de Ibagua	2/23/59	3/6/59	12322	14,140.00	2/28/59	2.447	30,151.93	5,557.22	10,454.71	3,484.55
169	13-N	Manuel Mejia	3/1/59	3/11/59	14029	14,169.29	2/28/59	2.447	34,328.96	6,327.08	13,832.59	4,610.40
170	3-N	Ca. de Guayaquil	3/8/59	3/19/59	14105	14,246.05	3/8/59	2.230	31,454.15	6,361.36	10,846.74	3,615.22
171	8-N	Ca. de Pasto	3/16/59	3/26/59	13503	14,140.00	3/21/59	2.043	27,586.63	6,089.85	7,356.78	2,452.24
172	10-N	Cartagena de Indias	3/22/59	4/2/59	13225	14,140.00	3/21/59	2.043	27,018.68	5,964.48	6,914.20	2,304.71
173	18-N	Ca. de Tunja	3/30/59	4/8/59	12485	14,140.00	3/31/59	1.859	23,209.62	5,630.74	3,438.88	1,146.28
174	9-N	Ca. de Barranquilla	4/5/59	4/16/59	12490	14,140.00	3/31/59	1.859	23,218.91	5,632.99	3,445.92	1,148.63
175	4-N	Ca. de Guayaquil	4/12/59	4/24/59	12367	14,140.00	4/14/59	3.050	37,719.35	5,577.52	18,001.83	6,000.61
176	14-N	Manuel Mejia	4/19/59	5/1/59	13144	14,140.00	4/18/59	2.922	38,406.77	5,927.94	18,338.83	6,112.33
177	9-N	Ca. de Pasto	4/26/59	5/7/59	13222	14,140.00	5/2/59	2.959	39,123.90	5,963.12	19,020.78	6,339.63
178	11-N	Cartagena de Indias	5/4/59	5/15/59	13311	14,140.00	5/2/59	2.959	39,387.25	6,003.26	19,243.99	6,414.02
179	19-N	Ca. de Tunja	5/10/59	5/21/59	13595	14,140.00	5/10/59	2.528	34,368.16	6,131.35	14,096.81	4,698.47
180	10-N	Ca. de Barranquilla	5/17/59	5/29/59	12602	14,140.00	5/25/59	2.491	31,391.58	5,683.50	11,568.08	3,856.03
181	5-N	Ca. de Guayaquil	5/24/59	6/5/59	13348	14,140.00	6/8/59	2.678	35,745.94	6,019.95	15,585.99	5,195.33
182	15-N	Manuel Mejia	5/31/59	6/11/59	9294	9,393.00	6/8/59	2.678	24,889.33	4,191.59	11,304.74	3,768.24
183	10-N	Ca. de Pasto	6/8/59	6/18/59	8047	8,127.47	6/16/59	1.873	15,072.03	3,629.20	3,315.36	1,105.12
184	12-N	Cartagena de Indias	6/15/59	6/26/59	12201	14,140.00	6/23/59	1.109	13,530.91	5,502.65	(6,111.74)	(2,037.25)
185	20-N	Ca. de Tunja	6/21/59	7/2/59	11830	14,140.00	7/1/59	.781	9,239.23	5,335.33	(10,236.10)	(3,412.03)
186	11-N	Ca. de Barranquilla	6/29/59	7/10/59	10000	10,100.00	7/6/59	.971	9,710.00	4,510.00	(4,900.00)	(1,633.33)
187	6-N	Ca. de Guayaquil	7/6/59	7/25/59	7920	10,801.95	7/20/59	1.181	9,353.52	3,571.92	(5,020.35)	(1,673.45)
188	16-N	Manuel Mejia	7/12/59	7/24/59	6700	10,801.95	7/20/59	1.181	7,912.70	3,021.70	(5,910.95)	(1,970.31)
189	11-N	Ca. de Pasto	7/20/59	7/31/59	7458	10,801.95	7/30/59	1.874	13,976.29	3,363.56	(189.22)	(63.07)
190	13-N	Cartagena de Indias	7/26/59	8/7/59	11015	12,967.14	8/4/59	2.076	22,867.14	4,967.77	4,932.23	1,644.08
191	21-N	Ca. de Tunja	8/2/59	8/14/59	10740	12,619.95	8/12/59	1.655	17,774.70	4,843.74	311.01	103.67
192	12-N	Ca. de Barranquilla	8/10/59	8/21/59	12087	14,320.54	8/17/59	1.639	19,810.59	5,451.24	38.81	12.94
193	7-N	Ca. de Guayaquil	8/17/59	8/27/59	11301	13,328.21	8/26/59	1.464	16,544.66	5,096.75	(1,880.30)	(626.77)
194	17-N	Manuel Mejia	8/29/59	/59*	10846	12,753.78	9/9/59	1.592	17,266.83	4,891.55	(378.50)	(126.16)
195	12-N	Ca. de Pasto	8/31/59	9/10/59	9194	10,801.95	9/9/59	1.592	14,636.85	4,146.49	(311.59)	(103.86)

\$674,854.99

\$1,472,204.87 \$275,901.98 \$521,645.90 \$173,866.56

[fol. 451]

FINAL SUMMARY OF DAMAGES
FOR GRANCOLOMBIANA SAILINGS

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 113

	<u>No. of Sailings</u>	<u>No. of Stems Aboard</u>	<u>Freight Paid (Dollars)</u>	<u>Total Profit before Steve. and Freight</u>	<u>Stevedoring at 35.15 per Stem</u>	<u>Net Profit</u>	<u>1/3 of Net Profit</u>
11/5/55 - 12/31/55 (#1 through 7)	7	70,145	\$ 76,460.00	\$ 88,518.98	\$ 24,655.97	\$ (12,596.99)	\$ (4,198.99)
1/1/56 - 12/31/56 (#8 through 58)	51	468,534	551,224.00	1,192,683.54	164,689.70	476,769.84	158,923.28
1/1/57 - 12/31/57 (#59 through 107)	49	497,424	574,481.00	1,307,519.83	174,844.54	558,194.29	186,064.76
1/1/58 - 9/25/58 (#108 through 144)	37	345,302	409,637.48	755,240.93	121,373.65	224,229.80	74,743.26
10/2/58 - 9/10/59 (#145 through 195)	50	611,756	674,854.99	1,472,402.87	275,901.98 (1)	521,645.90	173,866.56
		<u>1,993,161</u>	<u>\$2,286,657.47</u>	<u>\$4,816,366.15</u>	<u>\$761,465.84</u>	<u>\$1,768,242.84</u>	<u>\$589,398.87</u>

(1) At 45.1¢ per stem from 10/2/58

BALTIMORE SERVICE

EXHIBIT No. 115

[fol. 452]

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Exportadora Bananera Naboá, S.A.</u>	-	Upper Tween Deck			\$63,000.00	\$24,750.00
Ciudad de Tunja	15,995	14,396	.318	4,577.93		
Ciudad de Cartagena de Indias	15,995	14,396	.318	4,577.93		
Manuel Mejia	15,995	14,396	.318	4,577.93		
Ciudad de Barranquilla	15,995	14,396	.318	4,577.93		
Ciudad de Pasto	17,380	15,642	.318	4,974.16		
Ciudad de Guayaquil	17,380	15,642	.318	4,974.16		
	98,740	88,868		28,260.04		

Banana Distributors, Inc.

45,000.00 20,000.00

1) Ciudad de Tunja	11,475	10,328	.318	3,284.30		
2) Cartagena de Indias	11,475	10,328	.318	3,284.30		
3) Manuel Mejia	11,475	10,328	.318	3,284.30		
4) Ciudad de Barranquilla	11,475	10,328	.318	3,284.30		
5) Ciudad de Pasto	11,972	10,775	.318	3,426.45		
6) Ciudad de Guayaquil	11,972	10,775	.318	3,426.45		
	69,844	62,862		19,990.10		

1 - 2 - 3 - 4Lower Tween Deck

<u>Bins #</u>	<u>Cubic</u>	
1 LTS	865	
2 LTS	760	
5 LTS	995	
6 LTS	865	
9 LTS	1,215	
10 LTS	1,190	
11 LTS	535	6,425
	6,425	

Lower Hold

1 LHS	710	
2 LHS	600	
5 LHS	905	
6 LHS	935	
9 LHS	1,000	
10 LHS	900	5,050
	5,050	11,475

5 - 6Lower Tween Deck

<u>Bins #</u>	<u>Cubic</u>	
1 LTS	1,100	
2 LTS	850	
5 LTS	1,030	
6 LTS	890	
9 LTS	942	
10 LTS	990	
11 LTS	540	6,342
	6,342	

Lower Hold

1 LHS	1,060	
2 LHS	820	
5 LHS	1,070	
6 LHS	880	
9 LHS	920	
10 LHS	880	5,630
	5,630	11,972

BALTIMORE SERVICE

[fol. 453]

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Charles Consolo</u>					\$16,000.00	\$30,000.00
1) Ciudad de Tunja	4,085	3,677	.318	1,169.29		
2) Ciudad Cartagena de Indias	4,085	3,677	.318	1,169.29		
3) Manuel Mejia	4,085	3,677	.318	1,169.29		
4) Ciudad de Barranquilla	4,085	3,677	.318	1,169.29		
5) Ciudad de Pasto	4,265	3,839	.318	1,220.80		
6) Ciudad de Guayaquil	4,265	3,839	.318	1,220.80		
	<u>24,870</u>	<u>22,386</u>		<u>7,118.76</u>		

Lower Tween Deck 1 - 2 - 3 - 4 - 5 - 61 - 2 - 3 - 45-6

<u>Bins #</u>	<u>Cubic</u>	<u>Cubic</u>
3 LTS	760	835
4 LTS	865	1,070
7 LTS	865	960
8 LTS	720	600
12 LTS	555	540
13 LTS	320	260
	<u>4,085</u>	<u>4,265</u>

Philip R. Consolo - Lower Tween Deck

40,000.00

40,000.00

Ciudad de Tunja	10,290	9,261	.318	2,945.00
Ciudad Cartagena de Indias	10,290	9,261	.318	2,945.00
Manuel Mejia	10,290	9,261	.318	2,945.00
Ciudad de Barranquilla	10,290	9,261	.318	2,945.00
Ciudad de Pasto	10,566	9,509	.318	3,023.87
Ciudad de Guayaquil	10,566	9,509	.318	3,023.87
	<u>62,292</u>	<u>56,062</u>		<u>17,827.74</u>

[fol. 454]

BALTIMORE SERVICE

Exhibit 115 (Page 3)

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Cia. Frutera Sud Americana (Ecuador) S.A.</u>					\$52,000.00	\$10,000.00
1) Ciudad de Tunja	13,305	11,975	.318	3,808.05		
2) Ciudad Cartagena de Indias	13,305	11,975	.318	3,808.05		
3) Manuel Mejia	13,305	11,975	.318	3,808.05		
4) Ciudad de Barranquilla	13,305	11,975	.318	3,808.05		
5) Ciudad de Pasto	14,216	12,794	.318	4,068.49		
6) Ciudad de Guayaquil	14,216	12,794	.318	4,068.49		
	81,652	73,488		23,369.18		

Lower Hold - 1 - 2 - 3 - 4 - 5 - 6

<u>1 - 2 - 3 - 4</u>		<u>5 - 6</u>
<u>Bins #</u>	<u>Cubic</u>	<u>Cubic</u>
3 LHS	600	815
4 LHS	715	960
7 LHS	935	870
8 LHS	800	490
11 LHS	430	435
12 LHS	470	435
13 LHS	250	245
14 LHP	1,000	975
15A LHP	470	460
15 LHP	430	451
16 LHP	430	435
17 LHP	470	435
18 LHP	250	245
19 LHP	755	1,070
20 LHP	935	880
21 LHP	935	870
22 LHP	800	490
23 LHP	715	1,060
24 LHP	600	820
25 LHP	600	815
26 LHP	715	960
	13,305	14,216

[fol. 455]

1.	Total cubic of 6 vessels sailing to Baltimore	337,398 feet
2.	Total cubic of 4 vessels sailing to Galveston	194,164 feet
3.	Total cubic allowed to Philip R. Consolo on 6 vessels sailing to Baltimore	62,292 feet
4.	Total available sailings for 2 years on 6 vessels sailing to Baltimore (Arrived at by dividing 6 into 104 weeks)	17.33
	Times 337,398 equals	5,847,107.34
5.	Total available sailings for 2 years on 4 vessels sailing to Galveston (Arrived at by dividing 4 into 730 days)	18.25
	Times 194,164 equals	3,543,493
6.	Total cubic available at both Baltimore and Galveston	9,390,600.34 feet
7.	Total cubic allowed to Philip R. Consolo for 2 years 17.33 times 62,292 equals	1,079,520.36 cubic feet
8.	Percentage of cubic capacity allotted to Philip R. Consolo on Baltimore vessels	18.46
9.	Percentage of cubic capacity allotted to Philip R. Consolo on Baltimore and Galveston vessels	11.50

[fol. 456] [File endorsement omitted]

[fol. 457]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

No. 18,235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Intervenor.

Petition for Review of an Order of the
Federal Maritime Commission

Second Supplemental Joint Appendix—Filed April 16, 1964

[fol. 463]

BEFORE THE FEDERAL MARITIME BOARD

Docket No. 827

PHILIP R. CONSOLO, Complainant,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PANAMA
ECUADOR SHIPPING CORPORATION, Respondents.

COMPLAINANT'S REPLY TO PETITION OF RESPONDENT GRAN-
COLOMBIANA FOR EXTENSION OF TIME TO ANSWER COM-
PLAINT—Filed December 4, 1957

* * * * *

The complaint was filed under section 22 of the Shipping Act which provides that any person may file a sworn complaint setting forth any violation of the Act by a common carrier. The carrier against whom the complaint is filed must satisfy the complaint or answer it in writing "within a reasonable time specified by the Board." The Board's rules provide for answer within 20 days.

Complainant has an absolute statutory right to file a complaint and to have it determined within a reasonable time. A respondent is not authorized to forestall consideration of a complaint by anticipating its filing and requesting an advisory opinion in the same dispute on a non-adversary basis.

The petition for declaratory order was filed by Grancolombiana on November 8th, 1957, approximately two weeks after Consolo (complainant in this proceeding) had made the latest in a series of demands upon Grancolombiana for space. That demand was dated October 21, 1957. It stated that if the demand for space were not met by No-

vember 15, 1957, Consolo would file a complaint against Grancolombiana, claiming a space allotment and damages. [fol. 464] The Grancolombiana petition for declaratory relief was filed a week before the deadline specified in the Consolo demand of October 21.

* * * * *

Grancolombiana implies, in its petition for declaratory relief and its petition for indefinite postponement of its time to answer the complaint, that it finds itself helplessly torn between the inconsistent demands of competing interests. Whatever may be the embarrassment of Grancolombiana's present status, that embarrassment is Grancolombiana's own creation. Consolo's demands for space on Grancolombiana's ships were submitted long before Grancolombiana executed its space contracts now in force.

* * * * *

We submit that Grancolombiana is not entitled to flout the law and thereafter demand that the Board rescue it from the consequences of its unlawful conduct.

We do not know whether Grancolombiana will be liable to its present shipper for breach of contract if it awards space to Consolo. The fact that it may be, however, is no reason to deny Consolo an opportunity to obtain prompt disposition of his own claim which rests on the allegation that Grancolombiana has unlawfully excluded him from its vessels.

The complaint in this case was served November 15th. Grancolombiana did not verify its petition for an extension of time until two weeks later (November 29th) and did not serve it until December 2nd. We believe that this constitutes unwarranted delay, and that no reason has been shown which justifies an extension of time to answer beyond December 5th.

Respectfully submitted,

George F. Galland, Attorney for Complainant.

December 4, 1957

[fol. 465]

BEFORE THE FEDERAL MARITIME BOARD

(Rec'd FMB April 14, 1958)

GALLAND, KHARASCH & CALKINS

Attorneys at Law
1413 K Street, N. W.
Washington 5, D. C.

April 10, 1958

Mr. G. O. Basham
Chief Examiner
Federal Maritime Board
Washington 25, D. C.

Re: Consolo v. Grancolombiana—
Docket No. 827

Dear Mr. Basham:

This refers to the letter from Mr. Elkan Turk, Jr. to you dated April 8th, in which Mr. Turk implies that improper *ex parte* representations have been made by me to you with respect to the conduct of this case.

My first communication to you in the series mentioned by Mr. Turk was my letter of March 31, 1958, requesting a prehearing conference at an early date. A copy of that letter was furnished to Mr. Turk and to Mr. Giallorenzi. You replied in a letter dated April 2nd, informing me for the first time that Docket No. 827 was being "held in abeyance" until the Board should act on Grancolombiana's petition for a declaratory order. Since the determination to hold the case in abeyance was *ex parte* as far as I was concerned, it constituted a surprise to me, and I made inquiry by a telephone call to you—in which I then discerned and now discern no impropriety. I summarized our telephone conversation in a letter to you dated April 3rd, of which copies were furnished to Mr. Turk and Mr. Giallorenzi.

In my letter to you of April 3rd, I stated that I would stop in your office in the near future to discuss a specific date for a prehearing conference. I have not yet made the promised visit or otherwise discussed a prehearing date with you. Mr. Giallorenzi by letters of April 2 and April 4 urged delay in setting a prehearing conference. Mr. Turk also urged delay in his letter of April 8th. My own preference for a specific date has not yet been expressed. Obviously, I have given Messrs. Turk and Giallorenzi full opportunity to express their preference before expressing my own.

In summary, I emphasize that I have furnished to Messrs. Turk and Giallorenzi a copy of each of my written communications to you, plus a written report of our single telephone conversation. I consider myself not guilty in even a remote degree of furtive presentation of my side of the case.

Mr. Turk's concluding paragraph imputes to me a disregard of the convenience to other parties in setting a prehearing date. Since I have given the other parties full opportunity to express their preference before expressing my own, I plead not guilty to this count.

While I would have chosen a date earlier than the week of May 7th, I am satisfied to respect the convenience of Messrs. Turk and Giallorenzi by acquiescing to the dates suggested by them. For whatever materiality it may have in relation to the prehearing conference, I anticipate that the hearing itself will require about two hours for the presentation of the complainant's direct case relative to all matters other than the measure of reparation.

Very truly yours,

George F. Galland

cc. Elkan Turk, Jr., Esq., Renato C. Giallorenzi, Esq.

[fol. 467]

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket No. 827

PETITION TO INTERVENE—Filed April 29, 1958

Pursuant to Rule 3(b) and Rule 5(n), Public Counsel petition for leave to intervene in this proceeding.

The complaint alleges that respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as Grancolombiana) is a common carrier by water of cargoes in the trade from Ecuador to points on the Atlantic Coast of the United States. It is further alleged that Grancolombiana has contracted all of its refrigerated space, suitable for the carriage of bananas, to respondent Panama Ecuador Shipping Corporation and that Grancolombiana has failed to comply with complainant's demands for refrigerated space.

The complainant contends that Grancolombiana, by refusing to allocate refrigerated space to complainant, has violated Sections 14, 15, and 16 of the Shipping Act, 1916, and that Grancolombiana, a member of the Association of West Coast Steamship Companies, has violated Conference Agreement No. 3302.

Respondent Grancolombiana denies that it has violated any of the provisions of the Shipping Act, 1916, or that they have violated their conference agreement. They admit that they operate as a common carrier by water, but they contend that they are a contract carrier of bananas.

The question of whether or not Grancolombiana is a common carrier of bananas from Ecuador to United States Atlantic ports is one of substantial public interest in that it raises a serious question of the Board's jurisdiction.¹

¹ Similar issues were raised in *Banana Distributors Inc. v. Grace Line Inc.*, and *Arthur Schwartz v. Grace Line Inc.*, Docket Nos. 771 and 775, 4 F. M. B. — (decided April 30, 1957), where Public Counsel's petition to intervene was granted by Examiner C. W. Robinson.

The public interest in this proceeding is substantial and the grounds for intervention are pertinent to the issues already presented and do not unduly broaden them. [fol. 468] Public Counsel therefore request leave to intervene and be treated as a party to this proceeding.

Respectfully submitted,

Robert E. Mitchell, Assistant General Counsel,
Edward Aptaker, Chief, Regulation Branch, Division of Litigation, Robert J. Blackwell, Public Counsel.

Washington 25, D. C.
April 29, 1958

BEFORE THE FEDERAL MARITIME BOARD

Served June 23, 1958

FMB Docket Nos. 827 and 835

RULING ON MOTION FOR PRODUCTION OF DOCUMENTS
FOR INSPECTION AND COPYING

At the prehearing conference herein counsel for complainant in No. 827 filed a motion for an order requiring the production by respondent of documents for inspection and copying. Respondent has agreed to produce only that material referred to in items 1, 2, 3, 4, and 9(a), (b), and (c)(2) of the motion.

As the material sought in contested items 5, 6, 7, 8, 9(c)(1), and 10 of the motion is relevant to the basic issues involved or pertains to the question of reparation, and as it is hereby determined that the question of reparation shall be heard at the same time as the basic issues in the consolidated proceedings, respondent is hereby directed to produce for complainant's inspection and copying the material referred to in the contested items.

The material which respondent has agreed to produce, and that which is herein directed to be produced, shall be made available for inspection and copying at the office of respondent's agent in New York, N. Y., at the mutual con-

venience of the parties and within a reasonable time herefrom, the cost of the copying to be at complainant's expense. If, in the opinion of complainant's counsel, the material to be copied cannot be reproduced feasibly at the office of respondent's agent, it may be taken to a place reasonably close thereto for copying.

C. W. Robinson, Presiding Examiner

BEFORE THE FEDERAL MARITIME BOARD

Served August 21, 1958

FMB Docket Nos. 827 and 841

RULING ON REQUESTS FOR BILLS OF PARTICULARS AND
FOR DISCOVERY AND INSPECTION OF DOCUMENTS

In No. 827 respondent has requested a bill of particulars and moved for the production, inspection, and copying of documents. Reply thereto has been filed by complainant. A reply in the form of an affidavit of counsel has been filed to complainant's reply. Complainant's counsel, by letter, opposes consideration of the reply affidavit. The same series of documents has been filed in No. 841, except that complainant's counsel has filed a motion to exclude respondent's reply affidavit.

Rule 5(p) of the Board's Rules of Practice and Procedure provides that a reply is not permitted. No reason appears why this rule should be waived in the present instance, hence the reply affidavits will not be received.

Answer in No. 827 was filed on December 19, 1957. There is no indication that the complaint was so vague or in such form that a proper answer thereto could not be filed. As the underlying purpose of a bill of particulars is to supply additional information to permit a party to plead, the request for a bill of particulars in No. 827 is denied.

Answer had not been filed in No. 841. As the complaint in that proceeding states a prima facie cause of action, and as it does not appear to be so vague as to require fur-

ther particulars to enable respondent to make answer, the request for a bill of particulars in No. 841 is denied.

The motion for discovery in each proceeding identifies the desired material as "any and all correspondence, contract, invoices of whatsoever nature and any and all other documents exchanged between the complaint and the growers in Ecuador, their customers in the United States and [fol. 470] steamship companies which carried bananas from Ecuador to the United States for the complainant's account from [November 4, 1955, in No. 827 and July 21, 1956, in No. 841] to the date of this application." In No. 827 the supporting affidavit prays that the motion be granted "for the reasons stated above." This has reference to the request for bill of particulars, namely, that respondent must inquire of complainant as to its method of computation of damages. Complainant's reply asserts that the motion is defective as it makes no attempt to show good cause or that the information sought is relevant, and does not designate the documents with the proper specificity.

Rule 12(k) of the Board's Rules of Practice and Procedure provides that "upon the motion of any party showing good cause therefor," discovery, inspection, and copying may be ordered of specified documents, etc., "which constitute or contain evidence relating to any matter, not privileged, which [are] relevant to the subject matter involved * * * ." The reasons advanced for the discovery of the documents in the present proceedings are sufficient, and the documents are relevant to the subject matter involved. Furthermore, complainant would have to produce the documents in any case as part of its proof on reparation; producing it now rather than at the hearing might well result in the shortening of the hearing.

A somewhat different situation exists in No. 841. As previously stated, respondent's counsel failed to supply a concurrent affidavit in support of the discovery in that proceeding, and the later filed affidavit in being rejected as constituting a reply to a reply. This leaves no written justification on file. Since both proceedings seek the same general relief, however, and since the documents sought

in both are the same, it would be hyper-technical to grant the motion in one case and to deny it in the other, all other things being equal, it would be unthinkable to treat the two [fol. 471] complainants differently.

The motions for discovery are granted. The material directed to be produced shall be made available for inspection and copying at complainants' offices in New York, N. Y., at the mutual convenience of the parties and within a reasonable time herefrom, the cost of the copying to be at respondent's expense. If, in the opinion of respondent's counsel, the material to be copied cannot be reproduced feasibly at complainants' offices, it may be taken to a place or places reasonably close thereto for copying.

C. W. Robinson, Presiding Examiner.

BEFORE THE FEDERAL MARITIME BOARD

Served September 11, 1958 FMB Docket Nos. 827 and 841

RULING ON MOTIONS TO TAKE DEPOSITIONS AND NOTICE
OF FURTHER PREHEARING CONFERENCE

1. Respondent moves to take the deposition of complainant in No. 827, and of Sol Palitz, a vice president of complainant in No. 841. Complainants oppose the motions. There is no showing that the witnesses will not be present at the hearing, that their testimony should be perpetuated, or that the loss of the testimony sought is threatened. The motions therefore are denied.

2. In view of complainants' apparent willingness to cooperate with respondent in its effort to secure certain information relating to reparation, and pursuant to Rule 6(d) of the Board's Rules of Practice and Procedure, a further prehearing conference will be held herein before the undersigned on September 22, 1958, beginning at 10 o'clock a.m., in Room 4519, New General Accounting Office Building, Washington, D. C. The conference will be limited to matters pertaining to the issue of reparation.

C. W. Robinson, Presiding Examiner.

[fol. 472]

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket 835

BRIEF FOR PETITIONER FLOTA MERCANTE GRANCOLOMBIANA,
S.A. AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS—
Filed January 13, 1959

* * * * *

It is significant to note that the credible testimony of Mr. Friedlander was not impeached nor was it shaken in any manner whatsoever to the effect that the physical characteristics of petitioner's vessels make it impossible to service more than one shipper abroad for the purpose of carrying bananas. Mr. Friedlander, whose testimony was backed by the experience of seeing hundreds of loadings and unloadings of petitioner's vessels and a considerable amount of loadings and unloadings of Grace Line vessels, testified in great detail that even to permit three shippers, each sharing one deck alone aboard the petitioner's vessels, would cause chaos and confusion and so extend the loading or unloading time as to cause great delays in the shipments of bananas, which delays, according to Mr. Borrero, might be so disruptive upon the schedules of the vessels, particularly the southbound service which is much more remunerative to the petitioner, that it might cause the petitioner to abandon the carriage of bananas because of the harmful effect of the delays upon the southbound voyages.

A careful examination of Mr. Friedlander's testimony shows beyond a doubt that the acute problem of loading bananas aboard the petitioner's vessels commences with the very moment a longshoreman starts to walk up the staging from the barge into the side ports of its vessels which are located in the upper 'tween deck and which are so narrow as to permit only one longshoreman entering and leaving the vessel at the same time. The problem of loading the petitioner's vessels increases as the longshoremen commence to walk down the stagings into the lower hold,

which stagings Mr. Friedlander testified had to be placed at an acute angle because of the physical makeup of these vessels and the height of the decks, particularly the lower hold.

[fol. 473] Certainly these problems are not found in the Grace Line refrigerated holds which, we repeat, were constructed under the guidance of competent banana carriers for the purpose of carrying this commodity.

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF PANAMA ECUADOR SHIPPING CORPORATION—
Filed January 13, 1959

* * * * *

6. The Effect of Permitting the Use of the Flota Refrigerated Space by More Than One Banana Shipper.

The paramount consideration in determining the effect upon the eventual out-turn of bananas at Philadelphia of the introduction of more than one shipper into the Flota reefer space is that in loading the vessel in Ecuador, only one shipper may use a side port at any one time. There are a number of reasons why no shipper would be willing to share the same entry port at one time with another shipper. As Friedlander put it (R. 1420): "How are you going to separate who's carrying which stem of fruit? These people are animals down there. We have our own problem separating our own fruit."

Earlier in writing to Panama's buying agent in Ecuador, Friedlander had written (Ex. 98) " * * * you and I both know the nature of the stevedores in Bolivar; you can't get them to go into the particular place you want them to go many times."

There was an illuminating colloquy between the examiner and Mr. Friedlander which commenced with the examiner's inquiry as to why more than one shipper could not use one side port at the same time. The transcript reflects the following (R. 1457-1459):

"The Witness: I'll tell you some of the problems, Mr. Robinson.

In the first place, we have fruit sorters now in the banana holds because of the height of these decks where we have to go to this very unconventional three- [fol. 474] high stowage. We try to break the fruit down into the different sizes in various bins, calling them Chicos, Mediandos, and Grandes. The damage that would be created would be maximized on three-high stowage if you put a great big 12- or 13-hand stem on top of an 8- or 9-hand stem. So we try to separate the fruit into different sizes as she's going into these various bins. We have a man down at the foot of each staging calling 'Grande', 'Mediando', 'Chico'.

Examiner Robinson: That's the stagings within the hold, not on the—

The Witness: The stagings within the hold.

Examiner Robinson: All right. I just want to follow you.

The Witness: And many times they will go into areas where they are not supposed to go.

On top of that, I described to you the method of making these keys when they're locking each particular bin. There will be a couple of stackers. Let's say in this area there are men coming down the stages and running around to stow the fruit. And we'll call 'Mediando', which is let's say for this bin—

Examiner Robinson: That's all done within the ship?

The Witness: That's all done within the ship. The man that is stowing the— The paid of men stowing in this bin, they're looking for a certain-size few stems to close that bin up. They don't want anything too big or anything too small. They will collar this guy. They'll actually pull him out of the run to take a particular size stem of bananas that they want to finish off that bin with.

If there were two or three coming in to the same area, there would be total, complete confusion.

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[fol. 475]

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF COMPLAINANT PHILIP R. CONSOLO—

Filed January 14, 1959

• • • • •

Complainant requests an order (a) adjudging the contract between Flota and the preferred shipper to be contrary to law, and void and directing Flota to cease and desist from carrying out such contract; (b) requiring Flota to allot immediately to complainant refrigerated space for the shipment of bananas in Flota's vessels in the trade from Ecuador to United States Atlantic ports, averaging 50,000 cubic feet per week, or such portion thereof as the Board may find to constitute complainant's fair share; and (c) ordering Flota to pay reparation to complainant in the sum of \$600,000, plus such further damages as may accrue to the date of the Board's final disposition of this proceeding.

The complaint of Banana Distributors in Docket 841 is similar to Consolo's complaint, and seeks both a determination of Flota's status and reparation.

At the hearing the Examiner granted a motion to sever the issue of Flota's common carrier status from the issue of reparations (888-9). Proceedings to measure damages have thus been deferred.

• • • • •

Since July 1957 five new ships (TUNJA, MEJIA, INDIAS, PASTO, BARRANQUILA) have entered the service, which, with the IBAGUE, comprise the six now on the run (Ex. 1). Another new vessel (GUAYAQUIL) will replace the IBAGUE in early 1959 (1283).

Since the sixth vessel was placed on the run, the service has been extended to Peru (339). The new ships are about three knots faster than the old ships (1776) and each has 55,000 cubic feet of space suitable for the carriage of

bananas (Ex. 2). With the assignment of new ships to the run, the service improved (1775-6).

* * * * * * *

1. *The Facts*

Desperate for an issue with which to defend the complaints, Flota in its answer contends that its vessels are not [fol. 476] suitable for the carriage of bananas of more than one shipper. But Flota apparently thought better of this "issue" at the hearing and was content to let intervener carry its burden of going forward with proof. Contrasted with the testimony of Mr. Friedlander, intervener's general manager, Mr. Borrero's candor was like a breath of fresh air. His best effort on direct examination was the claim that any "appreciable" increase in banana loading time would cause problems in fulfillment of schedules (1260)—a claim which falls miles short of meeting the "issue". His objection against having more than one shipper aboard was that it might be inconvenient—not that it would be impossible. He stated "... it is better to deal with one than with three in any facet of negotiations. It is less problems" (1806). He admitted, however, that the problems in dealing with three would be more than offset by the prospect of more revenue (1807). And he is willing to give it a try if the Board should so ordain (1803-6, 1858).

The best evidence that Flota's ships *are* suitable for carriage of bananas of more than one shipper is the willingness of complainants to ship on the basis of less than full occupancy of the entire refrigerated space and their testimony that Flota's vessels are suitable for the carriage of bananas of more than one shipper (306-8, 919-20). Complainants are experienced banana importers willing to risk millions on the venture (Ex. 25, pp. 2 and 6)—if only given the chance. That the ships are suitable for multiple shippers also can be determined from the physical characteristics of the refrigerated space. The refrigerated cargo hold (No. 3) on all of Flota's ships is divided into three levels. Of the six ships now in service, five (TUNJA, MEJIA, INDIAS, BARRANQUILLA, and PASTO) are

spanking new. With the exception of the PASTO, the No. 3 hold in all of the new ships has the same cubic (55,000 feet) and deck heights, as follows (Exs. 2, 9, p. 4):

	<i>Cubic</i>	<i>Height</i>
Upper 'tween deck	15,990	9' 1"
Lower " "	20,650	9' 8"
Lower hold	18,360	8' 10"

The division of cubic on the PASTO differs only slightly from the other four. The sixth ship in service (IBAGUE) [fol. 477] will soon be replaced with a new ship similar to the others. The three level arrangement of the space suggests that the space is tailor-made for three shippers (Exs. 10, 11) and indeed, it is (306-7).

2. *The Distortions*

The distortions were furnished by intervener—the only party to profit from delay and the myth that Flota's vessels are unfit for several shippers at one time. Mr. Friedlander, the chief witness for intervener, was followed by (1) Mr. Baratta, a fruit selector employed by intervener and (2) Mr. Visconti, a refrigeration engineer retained by intervener, both of whom succeeded in contradicting most of what Mr. Friedlander had to say. Mr. Friedlander's contribution to the record was an ad nauseam rendition of the current advertising slogan (banana version). "Couldn't be done, couldn't be done, couldn't be done". Loading, carrying and unloading the bananas of more than one shipper (said Mr. Friedlander) couldn't be done. But when it came to explaining why it couldn't be done, Mr. Friedlander was in trouble. His testimony falls into one of three categories:

- (1) *Patent irrelevancies*—Most of his testimony related to problems, real or fancied, which are now present and which will remain irrespective of the number of shippers aboard (1083-5, 1104-5, 1127-9, 1131-4, 1163, 1171, 1190). The problems presented by staging equipment, for example, were commented upon at length, but on cross—were admitted to be present

in any event and to cause no additional delay (1394, 1408-9).

- (2) *Palpable exaggerations*—or an effort to make seem mysterious and complicated that which is prosaic and simple. His description of the mechanics of [fol. 478] loading the ships with a view to the unloading gear is an example¹⁵ (1129-36).

* * * * *

* * * Further, intervener's attempt to show Flota's inferiority boomeranged in the face of evidence as to Flota's (a) newer ships, (b) lower rates and (c) equivalent transit time (Exs. 1, 10-20, 35, 106). Contrary to Mr. Friedlander's assertions concerning the defects in Flota's service, are the admissions of his fruit selector, Mr. Baratta, (1) that better quality fruit arrives on Flota ships (1642) and (2) more damaged fruit arrives on Grace (1643), and his refrigeration expert, Mr. Visconti, that Flota's refrigeration facilities are satisfactory (1735-6, 1738)—an admission which was fortified by Mr. Borrero's testimony that the refrigeration facilities are "good" (1815). Mr. Friedlander's distortions that on Flota ships (1) we have outturned 50 to 60% ripe "fruit" (1164) and (2) "I should have added 3 to 5% extra ripens on the Grancolombiana vessels for stems that were thrown away" were impeached by his own records which show (1) the percentage of "ripes" has never

¹⁵ Mr. Friedlander's description of loading the Flota ships brings to mind an old Jimmy Durante routine. Durante would say he was waiting in line to get on a bus behind a woman with a large shopping bag: "She opens the shopping bag, takes out her purse and closes the shopping bag. Then she opens her purse, takes out her change purse, closes her purse, opens the shopping bag, puts her purse in the shopping bag and closes the shopping bag. I stands on the other foot. She opens her change purse, takes out a dime [this was an old routine], closes her change purse, opens the shopping bag, takes out her purse, closes the shopping bag, opens her purse, puts in the change purse, closes her purse, opens the shopping bag . . ." and so on.

So here, the ship could have been loaded with a cargo of a million pounds of bananas in the time it took Mr. Friedlander to describe the operation.

exceeded 13.41% (IBAGUE, Ex. 96, Voyage 151, discharged Aug. 9, 1958)—which is more than double the figure for any other Flota shipment and (2) stems discharged upon arrival averaged just 1% (Ex. 99)—not an unusual amount by comparison with the figures for Grace shipments (Ex. 100).

Mr. Friedlander's estimates of the delays to be encountered with multiple shippers (3 shippers, 7 to 12 hours; [fol. 479] 6 shippers, 10 to 15 hours; 10 shippers, 30 to 40 hours (1445)), were impeached by his admissions that (1) the time it takes to load the lower hold would be the same with one or three shippers (1435); (2) the changing of pontoons and stages would not occasion delay (1394); (3) delays can be minimized by the employment of competent supervisory personnel (1417-8, 1456); and (4) delays can be eliminated if the shippers used a common loader (1526).

It is ridiculous to assume (as Mr. Friedlander did) that shippers in the same boat would not co-operate with each other to expedite loading as a matter of enlightened self-interest. Even Mr. Friedlander admitted that it would be foolish for shippers to place obstacles in each other's path (1391-3). If a single stevedoring crew were used and a single loading boss employed with authority to deploy teams of stackers where needed, the bananas of more than one shipper can be loaded in the same vessel and in substantially the same time now consumed (1417-8, 1456). Mr. Friedlander's abhorrence at the "confusion" which he said would result if bananas of more than one shipper were loaded simultaneously—was not shared by complainants (306-8, 919-20). By the simple device of painting the stems of each shipper's bananas a different color (paint is now used in any event to seal in the juices), each stem will find its proper resting place in the part of the ship assigned to its owner. Even Mr. Friedlander will admit that the long-shoremen that load the ships are not color blind.

* * * * * *

COMPLAINANT'S PROPOSED FINDINGS AND CONCLUSIONS

* * * * *

3. Since July 1957, five new ships (TUNJA, MEJIA, INDIAS, PASTO, BARRANQUILLA) have entered the service, each having 55,000 cubic feet of space suitable for the carriage of bananas. The sixth ship now in service (IBAGUE) will soon be replaced by a new ship. Between July 1955 and the fall of 1957, the service was operated with five ships. With the addition of a sixth ship to the service in 1957, the service has been extended to Peru and has improved (11-12).

* * * * *

[fol. 480] 16. Flota's vessels are suitable for the carriage of bananas of more than one shipper. The refrigerated cargo space on all the ships is divided into three levels. Because of this arrangement, space is ideally suited for use by three shippers. Five of the new ships now in service are brand new. A sixth new ship soon will be added. Complainant considers the space desirable, is willing to share the space, and is willing to risk millions in shipping bananas on the basis of less than full occupancy of the space (25-7).

17. Flota presented no evidence in support of its defense that its vessels are not suitable for the carriage of bananas of more than one shipper. Flota's only objection to several shippers is that it might be inconvenient—not that it would be impossible (25-6).

* * * * *

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF PUBLIC COUNSEL—Filed January 14, 1959

* * * * *

As noted, Flota does not challenge the Board's decision in *Banana Distributors*, Docket Nos. 771/775. That decision prohibits a common carrier of general commodities from asserting contract carrier status as to bananas on its berth vessels. However, in that decision, the Board held

that the carrier's duties to banana shippers would depend upon the factual circumstances attending the loading, transportation, and discharge of the bananas. Thus, we believe that the loading and unloading problems that would be encountered by the introduction of other banana shippers to Flota's vessels pose the real question confronting the Board and the Examiner. This brief deals only with that factual problem.

Summary of the Evidence

Flota operates six vessels in its common carrier service between United States North Atlantic ports and ports on the West Coast of South America (Ex. 1, Tr. 23). This service has, since 1955, been operated on an approximately weekly frequency (Tr. 25-26). Prior to December 16, 1955, that frequency could be maintained with 5 vessels. However, on that date the service was extended to Peru, and in order to maintain a weekly service, Flota added a sixth vessel to its fleet.

Five of the ships now employed in this trade were built since 1957, and have a service speed of about 17½ knots. The other ship was built in 1951, and has a speed of 15½ knots (Ex. 1, Tr. 61-62). The latter vessel will be replaced by a new and faster ship in January or February, 1959, giving Flota a fleet of six new ships of equal class and speed (Tr. 1752-1753).

* * * * *

Because of the high deck heights in the lower hold of the old Flota ships, bananas had been stowed three high to utilize the full cubic capacity of the compartment (Tr. 185). This put too much weight on the bottom stems (Tr. 476). In order to minimize damage, an employee of the shipper would inspect the bananas as they came aboard the vessel, and the heavier stems were stowed in the upper tween deck (Tr. 1415). Thus, to some extent the lower deck and upper tween deck were loaded simultaneously.³

³ These circumstances still obtain in connection with the loading of the single surviving old ship.

The five new Flota ships, and presumably the sixth which will soon enter service, have less deck height in their lower holds than their predecessors (Ex. 9, Tr. 66). In fact, four of the new vessels now in service have less height in the lower hold than in the two holds above (Ex. 9).

As the lower hold becomes filled, some of the stages upon which the stevedores walk are removed and bananas are placed in the area where the stages had been. During the removal of these stages, all banana loading is stoppd (Tr. 1152). When the last stage is removed, the stevedores pass the bananas by hand to the men still working in whatever unoccupied space is left in the lower hold (Tr. 1135). As the loading of the lower deck nears completion, the rate of loading into that deck declines, but this slack is taken up by an increase in the loading of the upper tween deck [fol. 482] (Tr. 1155). However, a considerable portion of the lower tween deck cannot be loaded until the lower hold is finished because the various paraphernalia needed to close the square of the hatch between the two holds are stored on the floor of the lower tween deck (Tr. 1413). Upon completion of loading in the lower deck, the refrigerated plugs and hatch covers are set in place in the square of the hatch and the lower hold is closed (Tr. 1416-1417). That loading procedure is repeated in the loading of the two upper decks (Tr. 1525).

* * * * *

Flota calls almost every northbound vessel at Buenaventura, Colombia (Tr. 1241). Coffee is the principal cargo at that port, and from the standpoint of both revenue and tonnage, coffee is more important to Flota than the bananas which are loaded in Ecuador (Tr. 1243-1245). Because of the increased speed of the new Flota vessels, they presumably will be able to spend up to 60 hours loading coffee at Buenaventura without increasing their 12-day transit time from Ecuador to Philadelphia.

Flota's banana cargoes are unloaded at Philadelphia via a revolving pocket elevator and a system of conveyors (Tr. 77, 1127-1131, 1180). Friedlander stated that if more than one shipper were aboard these vessels, the unloading time

would be approximately doubled (Tr. 1186). In summary of his testimony, the witness stated that carriage of bananas on the Flota vessels is economically feasible only when all the refrigerated space is allotted to a single shipper (Tr. 1190).

Flota also carries bananas from Ecuador to U.S. Gulf ports on a 10 to 12-day frequency (Tr. 1621). This space is contracted to a single shipper who unloads the bananas at Galveston, Texas (Tr. 1260, 1265, 1618). The four vessels in the Gulf service are older and slower than the vessels in Flota's Atlantic service (Tr. 1620). Nevertheless, because of the shorter distances involved, the transit time between Ecuador and Galveston is one or two days shorter than that between Ecuador and Philadelphia (Tr. 1621).

* * * * *

[fol. 483] Under the circumstances, it is our view that more than one shipper can be accommodated on the Flota vessels, and that in denying space to the complainants, Flota has unjustly discriminated against complainants in violation of Sections 14 and 16 of the Shipping Act, 1916. Flota should be required to cancel its contract with Panama-Ecuador Shipping Corporation and make its refrigerated space available to all qualified shippers under reasonable conditions.

Flota's petition for declaratory order asks for a clarification, not only of its status in the Atlantic trade, but also in the Gulf trade. Nothing in the record serves significantly to distinguish Flota's U. S. Gulf from its U. S. Atlantic service. Thus, in that trade, too, Flota should be ordered to cancel its present contract and make its refrigerated space available to all qualified shippers.

Respectfully submitted,

Robert E. Mitchell, Assistant General Counsel; Edward Aptaker, Chief, Regulation Branch, Division of Litigation; Robert J. Blackwell, Public Counsel.

Washington 25, D. C.
January 14, 1959

BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

REPLY OF PUBLIC COUNSEL TO EXCEPTIONS AND TO MOTION TO
REOPEN THE RECORD FOR RECEIPT OF ADDITIONAL EVIDENCE
—Filed March 23, 1959

Introductory Statement

A. *The Posture of the Case*

Examiner C. W. Robinson's recommended decision in this case is, in large measure, built upon the implicit premise that this case is controlled by the Board's decision in *Banana Distributors, Inc. v. Grace Line*, 5 F. M. B. 278 (1957). There the Board found that bananas were susceptible to common carriage on Grace Line's vessels in the [fol. 484] trade from Ecuador to United States Atlantic ports, and held that Grace was a common carrier of bananas in that trade.

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Robert E. Mitchell, Asst. Gen. Counsel; Edward
Aptaker, Chief, Regulation Branch, Division of
Litigation; Robert J. Blackwell, Public Counsel.

Washington 25, D. C.
March 23, 1959

BEFORE THE FEDERAL MARITIME BOARD

November 9, 1959

Examiner C. W. Robinson
Federal Maritime Board
Washington 25, D. C.

Re: FMB Docket No. 827

Dear Mr. Robinson:

This refers to our letter of September 11, 1959, requesting that further hearing on reparation in this proceeding

be set at the earliest possible date, and to the reply of Mr. Giallorenzi dated September 16 opposing an early hearing. Mr. Giallorenzi's opposition is based upon the pending appeals of Grace Line and Grancolombiana and the claim that an early hearing "would result in a waste of time should the Circuit Court of Appeals disagree with the Board's rulings".

We submit that the delay requested by Grancolombiana would prejudice complainant and would deprive him of his procedural rights. We urge a prompt hearing on reparation for the following reasons:

1. The Pendency of a Court Appeal is no Ground for a Stay.

In its report decided June 22, 1959, the Board found that Grancolombiana violated sections 14 and 16 of the Shipping Act and ordered that such violations be discontinued. Effective September 1, 1959, Grancolombiana complied with the Board's order. Its petition to the Court of Appeals to review the Board's order requested no stay of the Board's order—although provision therefor is made in the law (5 U.S.C. 1039(b)). Consequently, the Board's findings of violations of the Act are entitled to respect until reversed by the courts and, in reliance upon such findings, complainant is entitled to pursue his claim for reparation [fol. 485] under section 22 of the Act. To stay all proceedings until the courts act would be to substitute a presumption of invalidity for the presumption of validity to which the Board's decision is entitled in proceedings before the Board.

2. An Indefinite Stay Is Unreasonable and Would Prejudice Complainant.

We understand that the Grancolombiana appeal to the Court of Appeals for the District of Columbia has been indefinitely postponed (at Grancolombiana's request) because of the similarity of the issues in its appeal with the issues presented by the Grace appeal to the Second Circuit. We understand that the Grace appeal will not be argued

before the spring of 1960. Although it is impossible to forecast the date when the Second Circuit will decide the case, it is likely that no decision will be handed down before the summer of 1960. After the decision is handed down, there exists the possibility of an appeal to the Supreme Court. Since the Grancolombiana appeal will remain in suspense until the Grace appeal is decided, it is doubtful that the Grancolombiana appeal will be re-activated soon. On the contrary, it is reasonable to assume that at least another year will pass before the Grancolombiana appeal is decided.

Grancolombiana has demonstrated its lack of faith in its appeal by not asking the Court for a stay. It would be outrageous to postpone the hearing on reparation indefinitely. The reparation hearing should be set now since (1) the reparation period is fixed, and (2) facts upon which the reparation claim is based are still relatively fresh in the minds of the witnesses. The delay requested by Grancolombiana would seriously prejudice Mr. Consolo and would deprive him of his procedural rights.

3. *The Scope of the Further Hearing*

Grancolombiana's request for delay ignores the fact that most of the evidence of damages already has been presented. Consequently, the further hearing would be relatively short. There remains only the matter of introducing (1) proof of damages from the cut-off date of the exhibits now in the record (September 25, 1958) to the date of Mr. Consolo's first shipment on a Grancolombiana vessel (on or about September 1, 1959), and (2) possible additional proof of Mr. Consolo's financial ability to have shipped the volume [fol. 486] of bananas for which damages are claimed. Complainant is anxious to complete his evidentiary presentation on these matters while records are still available and memory still reliable, and to avoid the creation of any unbridgeable gap between the record made in November 1958 and the record to be made at a further hearing.

Under section 22 of the Shipping Act, complainant is entitled to an opportunity to prove his damages. By deferring the hearing as requested by Grancolombiana, complainant would be substantially deprived of this statutory right. In effect Grancolombiana asks the Board for a stay which was not asked (and could not be had) from the Court of Appeals.

For the foregoing reasons we renew our request that the reparation hearing be set at the earliest possible date.

Very truly yours,

/s/ William J. Lippman
Attorney for
Philip R. Consolo

cc. Robert J. Blackwell, Esq.
All counsel

BEFORE THE FEDERAL MARITIME BOARD

(Rec'd FMB Nov. 16, 1959)

GIALLORENZI & CICHANOWICZ

Counsellors at Law

26 Broadway

New York 4, N. Y.

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November 13, 1959

Examiner C. W. Robinson
Federal Maritime Board
New General Accounting Office Building
Fifth and G Streets, N. W.
Washington 25, D. C.

Dear Sir:

Re: FMB Docket No. 827

We acknowledge receipt of copy of a letter dated November 9, 1959 addressed to your goodself by Mr. Consolo's attorneys, Galland, Kharasch and Calkins, which is a belated attempt on their part to answer our letter of September 16.

[fol. 487] With reference to the first point raised by counsel for Consolo, while it is true that no application for a stay was made before the Circuit Court of Appeals, nevertheless Grancolombiana, with the consent of the Public Counsel, agreed to defer the appeal pending in the Court of Appeals for the District of Columbia until the Grace Line appeal was disposed of by the Circuit Court of Appeals for the Second Circuit. In fact, prior to entering into such stipulation, it was suggested by the Public Counsel that the Grancolombiana appeal be deferred until the Grace Line matter was disposed of.

In answer to the second point raised by Consolo's counsel, there is no proof offered that any delay would prejudice the complainant. It would be a useless act and certainly time consuming on the part of the attorneys, particularly

the Public Counsel's office, to be engaged on two appeals on similar issues merely for the convenience of Mr. Consolo and his lawyers.

With reference to the third point made about the scope of the future hearing, it is true that insofar as Consolo's evidence is concerned in this regard h proof is complete but there is no doubt that Grancolombiana has not even begun to scratch the surface in this regard.

Undoubtedly Consolo's belated answer to our letter of September 16, 1959 is made with tongue in cheek and with the hope that possibly Grancolombiana would consider a settlement of his claim, which certainly it emphatically has no intention of doing.

It is therefore respectfully requested that the convenience of Mr. Consolo should be subordinated until the Circuit Courts of Appeal have decided these matters.

Respectfully submitted,

/s/ R. C. Giallorenzi
Renato C. Giallorenzi

rcg;ls

cc Galland, Kharasch & Calkins, Esqs.
1413 K Street, N.W.
Washington 5, D. C.

" Edward Aptaker, Esq.
Office of General Counsel
Federal Maritime Board
Washington, D. C.

[fol. 488]

BEFORE THE FEDERAL MARITIME BOARD

FEDERAL MARITIME BOARD

Washington 25, D.C.

In Your Reply
Refer to File No.

A17-7:232

November 18, 1959

Renato C. Giallorenzi, Esq.
Giallorenzi & Cichanowicz
26 Broadway
New York 4, New York

Re: Docket No. 827—*Philip R. Consolo v. Flota
Mercante Grancolombiana, S.A.*

Dear Mr. Giallorenzi:

We have received a copy of your letter of November 13, 1959, to Examiner C. W. Robinson, in which you respond to the letter of November 9, 1959, addressed to the Examiner by Messrs. Galland, Kharasch & Calkins.

Public Counsel take no position with respect either to the request made in the November 9 letter of Messrs. Galland, Kharasch & Calkins, or in your letter of November 13, responding thereto, and our acquiescence in the deferral of the prehearing conference in your suit for review is not to be taken as evidencing any position regarding the request of Messrs. Galland, Kharasch & Calkins.

Very truly yours,

/s/ Robert E. Mitchell
Robert E. Mitchell
Assistant General Counsel
Division of Litigation

cc: Galland, Kharasch & Calkins
1413 K Street, N. W.
Washington 5, D. C.
Examiner Robinson

[fol. 508]

IN THE UNITED STATES COURT OF APPEALS
No. 16,366 (Consolo)

PETITION FOR REVIEW—Filed May 22, 1961

1. This is a petition for review of a portion of an order of the Federal Maritime Board ("the Board") insofar as such order denied petitioner the full relief sought. The Board's order was entered under the Shipping Act, 1916, 46 U. S. C. 801, *et seq.*, and is reviewable under 5 U. S. C. 1031 ff. This court has jurisdiction under 5 U. S. C. 1032. Venue is in this court under 5 U. S. C. 1033. The United States of America is named as a respondent under 5 U. S. C. 1034. The Board is named as a respondent under Rule 38(a) of this court.

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IN THE UNITED STATES COURT OF APPEALS
No. 16,369 (Flota)

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL MARITIME BOARD—Filed May 24, 1961

This is a petition to review a final order of the Federal Maritime Board (the "Board") dated March 28, 1961, and served March 30, 1961, in which the Board held in effect that petitioner violated sections 14 Fourth and 16, Shipping Act, 1916 (46 U. S. C. §§ 812, 815) during the period August 23, 1957, to July 12, 1959, and directed petitioner to pay to Philip R. Consolo "on or before 60 days from the date hereof, \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondents' violation of Secs. 14 and 16 of the Shipping Act, as amended." A copy of the Board's order and report served March 30, 1961 in FMB Docket No. 827 and No. 827 (Sub. No. 1) is attached [fol. 509] hereto as Exhibit 1. A copy of an earlier Board report dated June 22, 1959, and served June 29, 1959, in Docket No. 827 et al., is attached hereto as Exhibit 2.

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[fol. 514]

IN THE UNITED STATES COURT OF APPEALS

Nos. 16,366 and 16,369

BRIEF FOR RESPONDENTS--Filed November 6, 1961

* * * * *

[fol. 515]

Conclusion

We have shown that the Board upon careful consideration of all the evidence before it and the Examiner's recommended decision reasonably, rationally, and correctly sifted the opposing allegations and arguments and arrived at a just and fair award. Weight was given to the Examiner's findings and credence given to the parties where merited, and the pertinent authorities were closely followed. The Board adopted the correct measure of damages and properly applied it to the evidence at hand in reaching its decision. Neither Consolo nor Flota have presented facts [fol. 516] or arguments which detract from the correctness of the Board's reparations award, and their petitions (Nos. 16,366 and 16,369) should therefore be dismissed.

Respectfully submitted,

James L. Pimper, Acting General Counsel;

Lee Loevinger, Assistant Attorney General Anti-trust Division;

Robert E. Mitchell, Assistant General Counsel;

Richard A. Solomon, Attorney, Department of Justice;

Robert J. Blackwell, Thomas D. Wilcox, Attorneys
for Federal Maritime Commission (successor to
Federal Maritime Board).

Washington, D. C.

November 6, 1961

* * * * *

[fol. 525]

BEFORE THE FEDERAL MARITIME BOARD

FMC Docket Nos. 827 and 827 (Sub. No. 1)

PETITION TO REOPEN—Filed June 7, 1962

This petition to reopen is filed in behalf of respondent Flota Mercante Grancolombiana, S. A. ("Flota"). On March 28, 1961, the former Federal Maritime Board issued a report and order in the above proceeding directing Flota to pay complainant Mr. Philip R. Consolo ("Consolo"), a banana importer, \$143,370.98 plus certain interest, as reparation for damages claimed by Consolo as the result of alleged unlawful denial of reefer space on Flota's vessels prior to 1959. On April 26, 1962, following petitions for review by both Consolo and Flota, the United States Court of Appeals for the District of Columbia denied Consolo's claim for additional reparations, set aside the former Federal Maritime Board's order directing Flota to pay reparations, and remanded the matter to the Commission as the Board's successor, for further proceedings. The purpose of this petition is to request the Commission to initiate the further proceedings contemplated by the Court's order and to request that such further proceedings also include reopening (a) for the taking of additional evidence on the matters specified hereinafter; and (b) for the purpose of reconsidering the remaining issues not passed [fol. 526] upon by the Court, dealing with calculation and mitigation of damages. Flota also requests leave to file a further brief and present oral argument to the Commission on the existing record, if the matter is not referred to an Examiner for further evidence.¹

Statement in Support of Petition

* * * * *

2. Flota believes that the present record before the Commission is already more than sufficient to require a finding

¹ We assume that if further evidence is taken there will be opportunity for further briefs and arguments as a matter of course.

that it would be inequitable to award any reparations to Consolo. The Court of Appeals explicitly stated that "Flota marshaled substantial evidence in support of its contention" (Op. page 17), and that the former Board "failed to give adequate consideration to this issue". Nevertheless, to fully demonstrate the unfairness of forcing Flota to pay reparations, Flota believes it necessary to submit additional evidence on the points specified below, including evidence of the later events to which the Court referred.

* * * * *

5. Specifically, in this connection Flota is informed and believes and requests that the record be reopened to permit it to prove, that following the Board's order of June 29, 1959, requiring Flota to open its space to all qualified shippers, those shippers who contracted for space on Flota's vessels, including Consolo, themselves recognized the problems involved from use of Flota's reefer facilities by multiple shippers and combined to act as a single unit in importing, discharging, and selling bananas, i.e., in effect to act as a single shipper; that this arrangement included the purchase and loading of bananas in Ecuador, with the possible exception of one shipper, and continued until mid-1961; that even this arrangement did not enable the shippers profitably to employ Flota's facilities; and that their actions and events during the 1959-61 contract period and subsequent thereto have proved that there was justification for Flota's belief that its facilities were not reasonably [fol. 527] adaptable for use by multiple shippers and that in fact Flota was correct and the Board was mistaken.

6. Flota is further informed and believes and requests opportunity to prove by such later events that after Flota opened its space the shippers actually utilizing that space incurred losses, as opposed to the hypothetical profits Consolo claimed he would have made if he had had space during the reparation period. These facts bear upon both the inequity of awarding reparations to Flota and the claimed fact of damage.

7. In this connection Flota further wishes to prove that although the rates and conditions in the 1961 renewal contract were substantially the same as those during the 1959-61 period, Consolo refused to renew that contract on the stated ground that the rate was unrealistic, voluntarily relinquished his space on Flota's vessels, and no longer utilizes Flota's service.

8. Flota believes that the matters referred to above, not available to the Board in its June 1959 report, strongly reinforce its contention as to the operational limitations upon use of its reefer facilities by multiple shippers and its contention that to force it to pay Consolo reparations for denial of space when he lost money after he obtained the space, would be inequitable to Flota.

* * * * *

11. The inequity of the Board's measure of damages in the circumstances here is emphasized by the fact that the evidence submitted by Consolo and relied upon by the Board did not in fact reflect the actual price Consolo would have had to pay for bananas if he had space on Flota's vessels, or the actual cost Consolo would have incurred in transporting such bananas on Flota's vessels. As to the former, the figures relied upon by the Board were the cost of bananas purchased for movement on Grace Line vessels from Ecuador ports not served by Flota. The Board thus overlooked or disregarded testimony of record that the cost of bananas in the areas served by Flota's vessels, Puerto Bolivar and Guayaquil, was higher than that in Grace Line's loading vessels (Puna) (178, 180-181, 183). [fol. 528] Flota now requests the Commission to reopen the record to permit it to prove by the actual experience of Flota's shippers, including Consolo, during the 1959-61 contract period that the cost of bananas in the Puerto Bolivar zone served by Flota is and during the reparation period was in fact higher than the banana cost data submitted by Consolo and relied upon by the Board. Flota further wishes to prove that the bananas actually purchased by Flota's shipper, Panama Ecuador, during the reparation period

cost on the average of 22 cents per stem higher than those moved by Grace Line from other areas reflected by the data submitted by Consolo and relied upon by the Board. By this factor alone the vacated reparation order was overstated by approximately \$43,000.

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14. The banana cost data and freight rates discussed above are also pertinent if the Commission should determine that the measure of damages employed by the Board is proper and equitable in the circumstances of this case. In such event these data are vital to show that even under that measure the Board's calculation was in error.

15. Moreover, the following is also important. The claimant here is an individual, Philip R. Consolo. But Mr. Consolo admitted that except for a few shipments on the Chilean Line, during the reparation period he conducted his banana business not as an individual, but through a number of corporations (2118). The bananas shipped in Consolo's Grace Line space during the reparation period were purchased in Ecuador, not by Consolo but by an Ecuadorian corporation called Ecuador Fruit Company, which sold them to a Panamanian corporation called Darien Refrigerated Shipping Company, which then sold them to a Delaware corporation called Dover Banana Company, which Consolo permitted to use his Grace Line space in return for buying bananas from the Darien company. The bananas were then sold for the account of Dover by R. Dixon & Company, a commission agent (324-26, 329-31, 333-42, 345-48, 350-51, 357). Consolo is the majority stockholder of Ecuador Fruit Company and of Darien; and a stockholder of Dover. It is impossible from the present record to determine through the maze of intercorporate transactions the total costs actually involved, what profit, if any, Consolo himself made in the bananas shipped via Grace Line, and could reasonably be expected to make via Flota's vessels, and how much of the claimed profit inured to others, because the Examiner erroneously refused to permit Flota to develop facts as to the actual operations and financial

results of these companies' operations, the actual expenses involved to the Consolo interests in importing bananas or Consolo's actual profit or loss through such operations (1903-06, 1918, 2123-27). These facts are highly material if the Board's theory of damages is correct, and indeed bear also on whether it would be equitable to apply that measure, or to force Flota to pay the individual Consolo any reparations at all. We therefore request the record be reopened to permit the facts to be developed concerning these matters.

16. Flota also requests that the Commission reopen the record to take evidence with respect to (a) the use of chartered vessels by Consolo during the reparation period and subsequent to the last hearings herein, to show the extent to which Consolo himself has chartered vessels to carry bananas to Atlantic United States and Gulf coast ports and could have chartered vessels to mitigate claimed damages during the reparation period. Flota is informed and believes that Consolo has chartered vessels for the carriage of bananas to such ports; (b) the investment or other expenditures Consolo was required to make in order to engage in the importation of bananas on Flota vessels under his 1959 contract. Flota believes that reopening of the record may disclose such expenditures by Consolo which should be reflected as further deductions in Consolo's claim for damages; (c) whether Consolo has any agreement with any person or entity relating to the sharing, directly or indirectly, of any recovery which may result from these proceedings. Flota is informed and believes that there is such an agreement; (d) other activities engaged in by Consolo during the reparation period, made possible by the fact he was not then engaged in shipping bananas by Flota, which should be considered in mitigation of his claim for damages.

[fol. 530]

Conclusion

It is impossible to specify in this motion all of the evidence to be adduced in connection with the above matters but those matters are decidedly relevant. Flota therefore

respectfully requests that the Commission reopen the record herein for the purposes of taking evidence on the matters above discussed, for consideration of the specific issues directed by the Court, and for reconsideration of the other issues not decided by the Court. If further evidence is not taken, Flota requests leave to file further briefs and to present oral argument to the Commission.

Respectfully submitted,

Odell Kominers, J. Alton Boyer, 529 Tower Building,
Washington 5, D. C., Attorneys for Flota
Mercante Grancolombiana, S.A.

June 7, 1962.

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BEFORE THE FEDERAL MARITIME BOARD

Served July 6, 1962 FMC Docket No. 827 (Sub. No. 1)

NOTICE OF REOPENING OF PROCEEDING—July 3, 1962

On March 30, 1961, the Federal Maritime Board after notice and hearing served an order in Docket No. 827, directing Flota Mercante Grancolombiana, S. A. (Flota) to pay to Philip R. Consolo (Consolo) the amount of \$143,370.98 as reparation for injury suffered because of Flota's violation of sections 14 and 16 of the Shipping Act, 1916 (46 U.S.C. 812 and 815). The Board's reparation order, and its earlier order of June 22, 1959, which found that Flota violated the Shipping Act, were the subject of three petitions for review filed by Flota and Consolo in the United States Court of Appeals for the District of Columbia Circuit (cases Nos. 15,330, 16,366 and 16,369).

[fol. 531] On April 26, 1962, the Court affirmed the Board's order of June 22, 1959, but set aside and remanded to this agency (as the Board's successor) the reparation order of March 30, 1961, stating:

“ * * * we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequi-

table to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board."

On June 8, 1962, Flota Mercante Grancolombiana, S.A. petitioned the Commission for the reopening of this docket for the purpose of taking additional evidence and for reconsideration of the reparation award. Complainant Philip R. Consolo replied to Flota's petition on June 25, 1962, opposing the taking of additional evidence. We are of the opinion that the taking of further evidence is not required nor warranted in this proceeding.

It Is Therefore Ordered, That the petition of Flota be denied insofar as it requests reopening the proceeding for additional evidence.

It Is Further Ordered, That Docket 827 (Sub. No. 1) be reopened for reconsideration of reparations upon the existing record; that such reopening shall be limited to the receipt of briefs and oral argument, with any fact relied upon by either party to be specifically identified by reference to the place in the record where found; that opening briefs shall be simultaneously filed by the parties with the Secretary, Federal Maritime Commission in Washington, D. C., on or before the close of business on July 31, 1962; and that reply briefs may be filed within ten days after the date of filing opening briefs.

By order of the Commission, July 3, 1962.

Geo. A. Viehmann, Assistant Secretary.

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[fol. 540]

BEFORE THE FEDERAL MARITIME BOARD

FMC Docket No. 827 (Sub. No. 1)

RESPONDENT'S REPLY BRIEF UPON REMAND AND
RECONSIDERATION—Filed August 31, 1962

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[fol. 547] In April 1958, Panama Ecuador faced a crisis in its banana importations via Flota. An unusually large

proportion of bananas—everybody's, not just Panama Ecuador's—were arriving in the United States in diseased or damaged condition and there had been a considerable drop in the banana market in the United States since January 1958 (431-32; Exs. 19, 101). In mid-April, Panama Ecuador's representative in Guayaquil claimed the right to invoke and threatened to invoke a "force majeure" clause under its contract with Flota, "until such time as these conditions disappear" (Ex. 101). Flota's manager in Guayaquil, referring in part to "the sudden drop of the banana price in the North American market", advised Flota on April 17, 1958 that

"As a personal commentary, Mr. Zevallos wishes to inform the General Manager that he confirms his opinion that this case deals with a financial problem; that such is a serious problem because, while it is true that Grancolombiana could prove the nonexistence of the 'force majeure', it is also true that, after collecting the guarantee for non-compliance with the contract, we would be facing a still graver problem, such as finding shippers interested in leasing the refrigerated space in our vessels; anything that could be gotten would require a great deal of time which would involve further losses to Grancolombiana than those which would have to be withstood with the agreement approved by the General Administration (Management)." (Ex. 101, p. 6).

[fol. 562]

BEFORE THE FEDERAL MARITIME BOARD

Served September 18, 1963

FMC Docket No. 827 (Sub. No. 1)

On rehearing on remand complainant found injured to the extent of \$106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

Robert N. Kharasch, William H. Lippman and Amy Scupi for complainant.

Odell Kominers and J. Alton Boyer for respondent.

REPORT—September 16, 1963

By the Commission (John Harllee, Chairman. Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, Commissioners):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,¹ this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grancolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

[fol. 563] On June 22, 1959, the Board in Dockets 827, 835 and 841² found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under reconsideration, in the amount of \$143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo \$259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the

¹ *Flota Mercante Grancolombiana, S.A., et al. v. F.M.C. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

² *Philip R. Consolo and Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

* * * whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.

[fol. 564] 2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.

3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).

4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.

5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared on appeal, to go this far; but we do consider * * * that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act, or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.

Discussion and Conclusions

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations [fol. 565] the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only reexamined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and

others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the Board's contention that a common carrier [fol. 566] for the public generally cannot also carry "a particular commodity on a contract basis".³ On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.⁴

³ *Grace Line, Inc. v. Federal Maritime Board*, 263 F.2d 709 (CA 2, 1959).

⁴ *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels. The Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.⁵ Of course, the courts could alter these decisions, [fol. 567] and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in

⁵ Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transporting them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.

that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable. Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of *Grace*. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, [fol. 568] to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a

similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

[fol. 569] More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective

procedure for handling the issue involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

* * * where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines v. C.A.B.*, 184 F. 2d 545 (CA-9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.⁶ In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.⁷ Flota's assertion of this position, which was sharply disputed by the [fol. 570] aggrieved shippers, led to a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt disposition of the controversy was thereby precluded, no matter what form the adjudication took.

⁶ 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(i), FMC Rules of Practice and Procedure.

⁷ Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.⁸

⁸ The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition, so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

[fol. 572] The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama

Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in [fol. 573] fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we

have reexamined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of \$34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of \$30.23* per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the \$30.23 rate in its computation.* We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of \$34 per ton actually charged by Flota when allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him \$36 per ton.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate above-mentioned, in our computation of reparations.

[fol. 574] Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yielding a total gross profit of \$2,513,236.43 (after

* See errata sheet at p. 515.

* In determining its reparation figure, the Board computed freight on the basis of 1.134 cents per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was \$30.23. Our use of the \$34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to \$1,353,139.65 and stevedoring and incidental expense amounting to \$585,876.87,¹⁰ the net profit for the 98 voyages is \$574,219.91, of which Consolo is entitled to 18.46% or \$106,001.00.

In our opinion this constitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

[fol. 575] An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$106,001.00, with interest

¹⁰ This figure is obtained by adding the amount of \$53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959, to the \$532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals \$53,641.94).

at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission September 16, 1963.

Thomas Lisi, Secretary.

BEFORE THE FEDERAL MARITIME BOARD

FMC Docket No. 827 (Sub. No. 1)

ORDER DIRECTING PAYMENT OF REPARATIONS—
Filed September 16, 1963

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al. v. F.M.C. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly reexamined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

It Is Ordered, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

Thomas Lisi, Secretary.

(Seal).

[fol. 576]

BEFORE THE FEDERAL MARITIME BOARD

Served October 9, 1963

FMC Docket No. 827 (Sub. 1)

ERRATA SHEET—October 8, 1963

The following corrections are hereby made in the Commission's Report served September 18, 1963:

- (1) On page 12 the figure "\$30.23" is substituted for the figure "\$22.54" wherever the latter appears;
- (2) On page 12, footnote 9, the figure "\$1.134" is substituted for the figure "84.56 cents".

October 8, 1963

Thomas Lisi, Secretary.

[fol. 577]

IN THE UNITED STATES COURT OF APPEALS

Nos. 18,230, 18,235

FURTHER SUPPLEMENTAL CERTIFICATION OF RECORD BY FEDERAL MARITIME COMMISSION—March 6, 1964

Pursuant to an order of this Court dated February 13, 1964, the Federal Maritime Commission was directed to file a supplemental record consisting of the official minutes of the Federal Maritime Board and the Federal Maritime Commission in their Dockets 827, 827 (Sub. No. 1), 835, and 841.

I hereby certify that the attached documents are copies of the official minutes which are and will be held in the custody of Thomas Lisi, Secretary, custodian of such records for the Federal Maritime Commission, for and on behalf of the Clerk of this Court, pursuant to the provisions of Rule 38(g) of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

All matter in addition to the above minutes, which was required by the Court's order of February 13, 1964 to be included in its supplemental record, has already been certified by the Commission as part of the record herein, in a Supplemental Certification of the Record filed January 6, 1964.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Maritime Commission to be affixed, on the 6th day of March, 1964.

Thomas Lisi, Secretary, Federal Maritime Commission.

[fol. 578]

BEFORE THE FEDERAL MARITIME BOARD

OFFICIAL MINUTES—(EXCERPTS)

Proceedings of the Federal Maritime Board

May 1, 1958.
(Regular Meeting)

Present: Chairman Morse and Member Stakem, a quorum. Vice Chairman Guill absent.

Also Present: E. R. Seaver, General Counsel; V. L. Russo and E. S. Shulters, of the Office of Ship Construction (entered the meeting at 8:50 A.M.); V. W. Mayer, of the Office of Ship Construction (entered the meeting at 9:00 A.M.); J. F. Harrell, Assistant General Counsel (entered the meeting at 9:00 A.M.); James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

Appearances: Representatives of The Ingalls Shipbuilding Corporation; Monro B. Lanier, Vice Chairman of the Board (entered the meeting at 9:00 A.M. and withdrew at 9:40 A.M.); D. W. Strickland, Vice President-General Counsel; J. M. Dickins, Manager, Change Order Department; and W. K. Ehrlich, Chief Electrical Engineer; (all entered the meeting at 9:00 A.M.).

The Board convened at 8:35 A.M. and adjourned at 9:55 A.M.

Flota Mercante Grancolombiana, S.A.—Petition for declaratory order—Consolidation of hearing with Docket No. 827.

There was presented the following memorandum dated April 22, 1958, from the Chief, Regulation Office:

“SUBJECT: Flota Mercante Grancolombiana, S.A.
Petition for Declaratory Order

“A petition for a declaratory order was filed by Flota on October 31, 1957, praying the Board to determine the validity of current contracts between it and two shippers of bananas moving from Ecuador to the United States. An amendment to that petition was filed on April 17, 1958. The contract for movements to the Gulf expires May 31, 1958, and the other, to the Atlantic, July 19, 1960. The petition states that after the decision of April 29, 1957, in the Grace Line case (Nos. 771 and 775) numerous firms and individuals have sought to use the space which is committed under the aforementioned contracts. The amendment indicates the contract for movements to the Gulf was executed July 2, 1957, effective June 1, 1957, and the one to the Atlantic on May 22, 1957, both on the basis of bids submitted by prospective shippers. Petitioner has had contracts with its shipper to the Atlantic and predecessor since 1955.

[fol. 579] “Petitioner distinguishes his vessels from those of Grace in that they have no compartments. Vessels serving the Atlantic have the entire No. 3 hold refrigerated, whereas most of the space for the Gulf is in No. 3 'tween decks.

“The petitioner is facing a dilemma; if the existing contracts are cancelled and space allocations made, it must answer suits for breach of contract; on the other hand, if no allocations are made, complaints seeking reparations may be anticipated. In fact one such complaint was filed by Philip R. Consolo (Docket No. 827) on November 15, 1957. Inasmuch as the facts to be developed in the complaint proceeding will be pertinent to the proceeding recom-

mended herein, the parties thereto are interested in the latter proceeding, and the former will not be expanded, we recommend that both be considered on the same record.

"The report of the Board in the Grace Line case is currently being reviewed by the Court of Appeals for the Second Circuit. The decision of the Court will probably be helpful in disposing of these proceedings, nonetheless we see no reason for delaying the taking of evidence.

"Recommendation:

"It is recommended that the Board grant the petition of Flota Mercante Grancolombiana, S.A. for a hearing in which there will be developed a record on which the Board can determine the validity of the aforescribed contracts of this carrier.

"Further it is recommended that the hearing in the proceeding be consolidated with the hearing in the complaint proceeding in Docket No. 827, *Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., and Panama Ecuador Shipping Corporation* for the receipt of evidence. An appropriate order is attached.

No Legal Objection:

(Signed) L. TIBBOTT

(Signed) E. ROBT. SEAVER
General Counsel"

[fol. 580] The order referred to in the foregoing memorandum is as follows:

"ORDER

* * * * *

After discussion, by the "yea" vote of Chairman Morse and Member Stakem, the recommendations contained in the above-quoted memorandum were approved, and the order as above set forth was adopted.

Proceedings of the Federal Maritime Board

June 22, 1959.
(Regular Meeting)

Present: Chairman Morse, Vice Chairman Guill and Member Stakem.

Also Present: G. L. Andrews, Deputy General Counsel; F. W. Gormley, of the Office of the Secretary (entered the meeting at 9:40 A.M.); James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 9:15 A.M. and adjourned at 10:30 A.M.

* * * * *

The Secretary was directed to sign and transmit an appropriate letter thereon. Copy of said letter and memorandum dated June 19, 1959, from the Chief, Regulation Office are in the files of the Secretary.

Report and order—Dockets Nos. 827, 835 and 841—Carriage of bananas from Ecuador to U. S.

The Secretary presented a draft of proposed report and order of the Board in Dockets No. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.; No. 835—Flota Mercante Grancolombiana, S. A.—Carriage of Bananas from Ecuador to the United States; No. 841—Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S. A., prepared in accordance with the Board's instructions following oral argument on exceptions to the recommended decision of the examiner heard by the Board on May 12, 1959.

[fol. 581] Prior to the meeting this morning copies of the proposed report and order of the Board were distributed to the members of the Board for review.

After discussion, by the "yea" vote of Chairman Morse, Vice Chairman Guill and Member Stakem, the Board adopted the following report and order, and authorized

the Secretary to issue them. Said report and order as issued read as follows:

* * * * *

Proceedings of the Federal Maritime Board

June 22, 1959.
(Special Meeting)

Present: Chairman Morse, Vice Chairman Guill and Member Stakem.

Also Present: G. L. Andrews, Deputy General Counsel; M. W. Belcher, of the Office of the General Counsel; L. C. Smith, Deputy Chief, Toby Jaffe and G. M. Rice of the Office of Government Aid; S. Hotsko, Special Assistant, Government Aid; James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

Appearances: Representatives of Grace Line Inc.: Burke G. Piper, E. F. Wilmerding, R. C. Alsop and E. R. Lutz.

The Board convened at 10:35 A.M. and adjourned at 12:05 P.M.

[fol. 582] Proceedings of the Federal Maritime Board.

January 25, 1961.
(Special Meeting)

Present: Chairman Wilson, Vice Chairman Stakem and Member Unander.

Also Present: J. Magnusson, Attorney-Adviser, Office of the Secretary; and Thomas Lisi, Secretary.

The Board convened at 11:20 A.M. and adjourned at 11:30 A.M.

Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Board discussed the record in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., oral argument on which had been heard by the Board at 10:00 A.M. this morning.

After discussion, the Board directed the Secretary to have draft of report prepared for submission to the Board in accordance with their instructions at this meeting.

By the "yea" vote of Chairman Wilson, Vice Chairman Stakem and Member Unander, the meeting adjourned at 11:30 A.M.

A true record.

Secretary.

[fol. 583] Proceedings of the Federal Maritime Board.

February 9, 1961.
(Regular Meeting)

Present: Chairman Wilson, Vice Chairman Stakem and Member Unander.

Also Present: J. L. Pimper, General Counsel; L. C. Hoffman, Chief, and D. E. Frye, of the Office of Ship Construction (entered the meeting at 10:45 A.M.); E. E. Metz, Chief, Office of Government Aid (entered the meeting at 10:50 A.M.); and Thomas Lisi, Secretary.

Appearances: Representatives of:

American President Lines, Ltd.: Noah M. Brinson and George T. Paine (entered the meeting at 10:55 A.M. and withdrew at 11:40 A.M.).

States Steamship Company: Walter D. Brennan, Vice President, M. B. Frochen, Secretary-Treasurer, J. W. Dickover, Vice President, Douglas C. MacMillan, of George G. Sharp Co., Naval Architects, James L. Adams and Gordon L. Poole, attorneys for States SS. Co. (all entered the meeting at 12:00 Noon and withdrew at 12:40 P.M.).

The Board convened at 9:40 A.M. and adjourned at 12:50 P.M.

Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Board noted that the matter of Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., transmitted by the Chief Examiner, Office of Hearing Examiners, under date of February 2, 1961, was now ready for decision by the Board.

* * * * *

[fol. 584] Proceedings of the Federal Maritime Board

March 24, 1961.
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Unander and Member Wilson.

Also Present: J. L. Pimper, General Counsel; W. R. Burchill, of the Office of the General Counsel (withdrew from the meeting at 3:10 P.M.); Thomas Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 2:35 P.M. and adjourned at 3:15 P.M.

NOTE: This matter disposed of by memorandum dated March 28, 1961, from the Chief, Office of Regulations, copies of which were furnished to Members of the Board, and copy of which is in the files of the Secretary.

Mr. Burchill withdrew from the meeting at 3:10 P.M.

Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

The Board directed the General Counsel to review the proposed decision of the Federal Maritime Board in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., and unless he observes possible legal questions involved in said decision, to return it to the Secretary for issuance.

By the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the meeting adjourned at 3:15 P.M.

A true record.

Assistant Secretary.

[fol. 585] Proceedings of the Federal Maritime Board.

March 27, 1961.
(Regular Meeting)

Present: Vice Chairman Unander and Member Wilson, a quorum. Chairman Stakem absent.

Also Present: J. L. Pimper, General Counsel; Thomas Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 9:30 A.M. and adjourned at 9:55 A.M.

Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

Pursuant to instructions of the Board at the special meeting on March 24, 1961, the General Counsel reported that he had reviewed the proposed decision of the Federal Maritime Board in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., and that there were no legal questions involved.

After discussion, by the "yea" vote of Vice Chairman Unander and Member Wilson, the Board directed the Secretary to have the proposed decision modified so as to incorporate language to the effect that, in the event full payment is not made within the sixty day period provided for, interest will begin to accrue thereafter on the unpaid amount, and resubmit to the Board after modification.

By the "yea" vote of Vice Chairman Unander and Member Wilson, the meeting adjourned at 9:55 A.M.

A true record.

Secretary.

[fol. 586] Proceedings of the Federal Maritime Board.
March 28, 1961.
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Unander and Member Wilson.

Also Present: Thomas Lisi, Secretary.

The Board convened at 10:00 A.M. and adjourned at 10:15 A.M.

Report & Order—Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Secretary presented a proposed Report and Order of the Board in Docket Nos. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.; and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., which had been modified pursuant to directions of the Board at the regular meeting on March 27, 1961.

After discussion, by the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the Board adopted the Report and Order, and directed the Secretary to sign and issue them. Said Report and Order as issued read as follows:

* * * * *

By the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the meeting adjourned at 10:15 A.M.

A true record.

Secretary.

[fol. 587] Proceedings of the Federal Maritime Commission.

July 3, 1962.
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Harlee and Commissioner Patterson, a quorum. Commissioners Barrett and Day absent.

Also Present: E. E. Metz, Executive Director; J. L. Pimper, General Counsel; and G. A. Viehmann, Assistant Secretary.

The Commission convened at 9:40 A.M. and adjourned at 10:00 A.M.

Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.—Proceeding reopened for reconsideration of reparations.

The Commission considered petition dated June 7, 1962, of respondent, Flota Mercante Grancolombiana, S.A., to reopen the record in Dockets Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., for the purposes of taking evidence, for consideration of the specific issues directed by the Court, and for reconsideration of the other issues not decided by the Court; and, if further evidence is not taken, to be permitted to file further briefs and present oral argument to the Commission; and reply thereto dated June 25, 1962, by complainant, Philip R. Consolo, transmitted by the Chief Examiner, Office of Hearing Examiners under date of July 2, 1962.

After discussion, by the "yea" vote of Chairman Stakem, Vice Chairman Harllee and Commissioner Patterson, the Commission took the following actions:

1. Denied petition of respondent, Flota Mercante Grancolombiana, S.A., insofar as it requests reopening of Docket 827 (Sub. No. 1) for additional evidence.
2. Granted petition of respondent that Docket 827 (Sub. No. 1) be reopened for reconsideration of reparations upon the existing record and directed:

(a) that such reopening shall be limited to the receipt of briefs and oral argument, with any fact relied [fol. 588] upon by either party to be specifically identified by reference to the place in the record where found, and

(b) that opening briefs shall be simulanteously filed by the parties on or before the close of business on July 31, 1962, and reply briefs filed within ten days after the date of filing opening briefs,

and directed that an appropriate order on said actions be issued. Said order as issued reads as follows:

• • • • •

Memorandum dated July 2, 1962, from the Chief Examiner, Office of Hearing Examiners, relative to the above matter is in the files of the Secretary.

Proceedings of the Federal Maritime Commission.

October 29, 1962.
(Regular Meeting)

Present: Chairman Stakem, Vice Chairman Harlee, Commissioners Barrett, Day and Patterson.

Also Present: J. L. Pimper, General Counsel; E. E. Metz, Executive Director (withdrew from the meeting at 4:05 P.M.); J. B. Blum, of the Office of the General Counsel (entered the meeting at 4:15 P.M. and withdrew at 4:45 P.M.); J. E. Mazure, of the Office of the General Counsel (entered the meeting at 4:50 P.M.); T. Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Commission convened at 3:00 P.M. and adjourned at 5:25 P.M.

Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

The Commission discussed the record in Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., oral argument on which had been heard by the Commission on October 24, 1962.

After discussion, the Commission directed the General Counsel to prepare a proposed report and order in accordance with instructions given at this meeting.

[fol. 589] During the discussion of the above matter, Mr. Blum entered the meeting at 4:15 P.M. and withdrew at 4:45 P.M.

Mr. Mazure entered the meeting at 4:50 P.M.

* * * * *

Proceedings of the Federal Maritime Commission.

September 16, 1963.
(Regular Meeting)

Present: Chairman Harlee, Vice Chairman Barrett, Commissioners Day and Patterson. Commissioner Stakem absent.

Also Present: J. L. Pimper, Acting Managing Director; R. E. Mitchell, Acting General Counsel; J. C. Hunt, Special Assistant to Chairman Harlee (entered the meeting at 2:35 P.M.); W. A. Stigler, Director, and L. F. Fuller, Deputy Director, Bureau of Foreign Regulation (entered the meeting at 3:20 P.M.); and T. Lisi, Secretary.

The Commission convened at 2:00 P.M. and adjourned at 3:50 P.M.

Report and Order—Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Commission considered draft of proposed Report and Order of the Commission in Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., which had been prepared pursuant to instructions given by the Commission at the regular meeting on October 29, 1962, copies of which had previously been distributed to the Commissioners.

After discussion, by the "yea" vote of the Chairman Harlee, Vice Chairman Barrett, Commissioners Day, Patterson and Stakem,* the Commission adopted the Report and Order and directed that they be served on the parties.

* Commissioner Stakem advised the Secretary that he had reviewed the draft of Report and Order and wished to have the record reflect that he voted to adopt said Report and Order.

The Commission's Report and Order in Docket No. 827 (Sub. No. 1) as served, will be found in the formal docket of this proceeding.

[fol. 590]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 1

FMB Docket No. 827

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
 STATEMENT AS TO WHEN EACH OF OUR
 VESSELS ENTERED THE BANANA TRADE
 BETWEEN ECUADOR AND UNITED STATES
 NORTH ATLANTIC PORTS

CIUDAD DE QUITO	December 26, 1949
CIUDAD DE MEDELLIN	July 8, 1951
CIUDAD DE MANIZALES	April 3, 1953
CIUDAD DE CALI	August 26, 1953
CIUDAD DE IBAGUE	November 29, 1953
CIUDAD DE TUNJA	July 29, 1957
MANUEL MEJIA	February 8, 1958
GARTAGENA DE INDIAS	May 17, 1958
CIUDAD DE PASTO	July 5, 1958
CIUDAD DE BARRANQUILLA	July 21, 1958

Source: Supplied by Grancolombiana

[fol. 591]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 15

FMB Docket No. 827

AGREEMENT entered into this 20th day of July, 1955, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation with its principal place of business in the City of Bogota, Republic of Colombia, S.A. (hereinafter called "GRANCOLOMBIANA"), acting herein through its duly authorized Agent, the North American Division of TRANSPORTADORA GRANCO-

LOMBIANA, LTDA., a Colombian limited liability company authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and Mr. LEONARD MOREY, of 383 Lafayette Street, New York, New York and SAMUEL G. STAFF, of 415 Fifth Avenue, New York, New York, (hereinafter jointly called "LESSEE").

WITNESSETH

1. GRANCOLOMBIANA agrees to lease to LESSEE the refrigerated space existing at the present in the hold #3 of its vessels known as "CIUDAD DE MANIZALES", registered in Colombia, S.A., "CIUDAD DE QUITO", registered in Ecuador, S.A. "CIUDAD DE MEDELLIN", "CIUDAD DE CALI" and "CIUDAD DE IBAGUE" registered in Colombia, S.A., for the transportation of bananas from Guayaquil or Puerto Bolivar or Esmeraldas, Ecuador, S.A., to Philadelphia, Pennsylvania, U.S.A., on all northbound trips made by such vessels from said Ecuadorian ports, via Buenaventura, Colombia, to New York, New York, U.S.A., and LESSEE hereby hires all such refrigerated space under the terms and conditions hereinafter stipulated.

4. GRANCOLOMBIANA will give LESSEE, in his offices in Guayaquil, approximately five days advance notice of the date at which a vessel will be expected to be ready to load at Guayaquil, and thereafter shall keep LESSEE regularly informed of any change in the expected readiness of the vessel. If LESSEE desires to load at Puerto Bolivar or Esmeraldas instead of Guayaquil, LESSEE should im-[fol. 592] mediately, upon receipt of above mentioned notice, notify GRANCOLOMBIANA by cable accordingly.

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 33

BANANA FREIGHTING AGREEMENT—
FREIGHTER VESSELS

Banana Freighting Agreement entered into the September 30, 1957, by and between GRACE LINE INC., hereinafter called "Grace" and Philip R. Consolo hereinafter called the "Shipper".

1) This Agreement covers the transportation of bananas from Puna (Guayaquil), Ecuador, in the refrigerated space suitable for the carriage of bananas specified as

Bin S-4-B 1888 cu. ft.	Bin S-4-H 2645 cu. ft.
Bin S-4-D 4058 cu. ft.	Bin S-4-J 1607 cu. ft.
Bin S-4-C 1893 cu. ft.	Bin S-4-K 1928 cu. ft.
Bin S-4-F 1590 cu. ft.	Bin S-4-L 1607 cu. ft.
Bin S-4-G 1628 cu. ft.	
	<hr/> Total 18843 cu. ft.

in the freighter vessels of Grace operated in approximately weekly service to New York, namely the SANTA ELISA, SANTA INES, SANTA OLIVIA, SANTA RITA, SANTA CATALINA, SANTA TERESA and SANTA ANA, or suitable substitutes.

2) The presently scheduled arrival and departure day of said freighter vessels at Puna, Ecuador, Northbound, is Friday and the presently scheduled arrival day at New York is Monday. These scheduled days may be advanced or retarded by Grace three (3) days upon five (5) days prior notice to the Shipper.

3) Freight will be computed at the rate of \$36.00 U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight is considered earned, bananas loaded or not, vessel lost or not lost. For the use of the refrigerated space specified in paragraph one hereof, the Shipper guarantees to Grace a minimum payment against freight

charges in the amount of \$0.325 U.S. Currency per cubic foot of space made available to the Shipper, used or not used; such minimum freight payment totals \$6100.00.

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[fol. 593]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 34

CHILEAN LINE
Compania Sub-Americana De Vapores
29 Broadway
New York 6, N.Y.

July 28, 1958

Mr. Philip R. Consolo
202 Franklin Street
New York, N. Y.

RE: Bananas Puna/Baltimore
SS MAIPO #52 N.B.

Gentlemen:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS MAIPO scheduled to load Puna on or about August 17 or 18 the conditions of carriage are as follows:

Loading:	Port of Puna, Ecuador
Discharging:	Baltimore
Length of voyage maximum 11 days	

1. The shipment must be loaded within 12 hours after the ship has been declared in "Free Pratique" Saturdays, Sundays and holidays included, and in case it is not loaded within that time, the Master has the right to sail and the total freight on the available space is to be paid neverthe-

less. Should the Master decide to stay over the 12 hours, due to the fault of the cargo, the shipper must pay \$200.00 (Two Hundred Dollars) per hour for each hour waiting time.

2. In order for the vessel to call at Puna the shipper guarantees that unless notification is given 20 days in advance of the scheduled date of call of the impossibility to load the total or part of the cargo he will guarantee to pay freight on a minimum of 200 tons for the available space, whether or not used.

3. Upon arrival at destination, the cargo will be discharged at the ship's convenience, Saturdays, Sundays and holidays included, and the cargo must be received as fast as the vessel discharges. Any time lost by the vessel in discharging by fault of the receiver will be charged to the [fol. 594] cargo at the rate of \$200.00 (Two Hundred Dollars) per hour.

4. The ship assumes the responsibility of maintaining the Chambers at the temperature requested by the shippers, in writing, within two degrees, one degree over or one degree below otherwise the ship will maintain a temperature at its own discretion. At any rate, the carrier assumes no responsibility concerning the condition of the cargo on delivery.

5. The cargo is to be loaded and discharged for account of the shippers and all expenses connected therewith, such as clerking, tallying, etc., are to be absorbed by the shippers. However, you have requested and we have accepted to discharge the cargo for your account for which you will pay us a fee of \$12.50 per 2,000 pounds. Nevertheless, considering that we are performing the discharging for your account, item 3 above will remain in effect.

6. The shipper will pay freight at the rate of \$31.00 per 2000 pounds, outturn weight, free in and out, and the estimate of the freight plus discharging fee is to be paid twenty (20) days prior to loading.

We estimate you can load a minimum of 267 tons in 29434 cubic feet of available space and your check in the following amount is requested:

Freight:

534,000 #— at \$31.00 per 2000 pounds = \$ 8277.00

Discharging:

534,000 #— at \$12.50 “ “ “ = 3337.50

\$11614.50

7. All taxes to which the freight is subject shall be for account of the shipper.

8. Our principals, Compania Sud-Americana de Vapores, in Valparaiso, will notify your shippers through our Guayaquil agents, the loading date and approximate hour of arrival 5 days in advance.

To acknowledge your agreement to the foregoing conditions, we shall appreciate your signing the duplicate copy of this letter, and returning it to us with your remittance.

[fol. 595] Accepted subject to all conditions of the stipulations, exceptions, and conditions of the dock receipt and bill of lading, whether written, printed or stamped.

Your early attention to this will be greatly appreciated.

Very truly yours,

CHILEAN LINE, INC.

Agents, C.S.A.V.

/s/ J. SLATTERY

per ALFRED A. CAMPION
TRAFFIC MANAGER

CHILEAN LINE
 Compania Sud-Americana De Vapores
 29 Broadway
 New York 6, N.Y.

September 3, 1958

Mr. Philip R. Consolo
 202 Franklin Street
 New York, N. Y.

RE: BANANAS PUNA/BALTIMORE
 SS ACONCAGUA #54 N. B.

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS ANCONCAGUA scheduled to load Puna on or about Sept. 16th, the conditions of carriage are as follows:

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[fol. 596]

CHILEAN LINE
 Compania Sud-Americana De Vapores
 29 Broadway
 New York 6, N.Y.

September 3, 1958

Mr. Philip R. Consolo
 202 Franklin Street
 New York, N. Y.

RE: BANANAS PUNA/BALTIMORE
 SS IMPERIAL #50 N.B.

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS IMPERIAL scheduled to load Puna on or about Sept. 30th, the conditions of carriage are as follows:

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CHILEAN LINE
 Compania Sud-Americana De Vapores
 29 Broadway
 New York 6, N.Y.

September 24, 1958

Mr. Philip R. Consolo
 202 Franklin Street
 New York 5, N. Y.

RE: BANANAS PUNA/BALTIMORE
 S/S COPIAPO #52

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our S/S COPIAPO scheduled to load Puna on or about October 30th, the conditions of carriage are as follows:

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[fol. 597]

CHILEAN LINE
 Compania Sud-Americana De Vapores
 29 Broadway
 New York 6, N.Y.

September 24, 1958

Mr. Philip R. Consolo
 202 Franklin Street
 New York 5, N.Y.

RE: BANANAS PUNA/BALTIMORE
 S/S MAIPO #53

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our S/S MAIPO scheduled to load Puna on or about October 13th, the conditions of carriage are as follows:

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BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 36

MEMORANDUM OF AGREEMENT entered into the Fifteenth day of July, 1953 at New York, New York by and between GRACE LINE INC. and Philip R. Consolo hereinafter referred to as "the Shipper", upon the following terms and conditions:

1. This agreement covers the use for the transportation of bananas between Puna or Puerto Bolivar, Ecuador and New York, N. Y. of the refrigerated space suitable for the carriage of bananas in the entire Lower Tween Deck of Hatch No. 4 in the freighter vessels of the Grace Line sailing approximately every two weeks between Puna or Puerto Bolivar, Ecuador and New York.

2. The freighter vessels presently operated in this service are the S/S SANTA INES, S/S SANTA OLIVIA, and S/S SANTA RITA. This contract covers any suitable vessel with refrigerated space which may be substituted for any of the above vessels.

[fol. 602]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 37

MEMORANDUM OF AGREEMENT entered into the Fifteenth day of July, 1953 at New York, New York by and between GRACE LINE, INC. and Philip R. Consolo, hereinafter referred to as "the Shipper," upon the following terms and conditions:

1. This agreement covers the use for the transportation of bananas between Puna, or Puerto Bolivar, Ecuador and New York, N.Y. of the refrigerated space suitable for the carriage of bananas in the entire Lower Tween Deck of Hatch No. 3 in the regular weekly passenger vessels of

the Grace Line in service between Puna, or Puerto Bolivar, Ecuador and New York.

2. The passenger vessels presently operated in this weekly service are the S/S SANTA BARBARA, S/S SANTA CECILIA, S/S SANTA ISABEL, S/S SANTA LUISA, S/S SANTA MARGARITA and S/S SANTA MARIA. This contract covers any suitable vessel with refrigerated space which may be substituted for any of the above vessels.

3. The presently scheduled arrival and departure day at Puna, or Puerto Bolivar, Ecuador northbound is Friday, and the presently scheduled arrival day at New York is Monday, but these scheduled days may be advanced or retarded twenty-four (24) hours upon prior notice to the shipper. This will only be done when necessary.

4. Grace Line Inc. shall have the option of placing vessel on berth to load at either Puna or Puerto Bolivar, Ecuador. Grace Line Inc. shall advise the Shipper at which port vessel will load four (4) days prior to arrival. At Ecuadorian loading port it is agreed that the bananas will be loaded by the Shipper, or his agents, free of expense to the vessel, and such loading operations must be completed within the scheduled stay of the vessel at Ecuadorian loading port, presently calculated to be a maximum of twelve (12) hours to be counted from the time vessel receives pratique on arrival. Ships may sail at conclusion of lay-time irrespective of amount of bananas loaded. Ships will furnish power and winches whenever required, also lights for night work.

[fol. 603] 5. Grace Line Inc. undertakes that it will exercise due diligence to make vessels tendered for carrying fruit under this agreement tight, staunch and strong and in all respects seaworthy and properly manned, equipped and supplied, and to make the refrigerated space in which the bananas are carried fit and safe for its reception, carriage and preservation. Grace Line will follow the instructions of the Shipper or his agents with respect to the pre-

cooling of the compartment and refrigeration of the bananas, subject to the directions of the Master of each vessel in so far as the vessel's safety is concerned. The Shipper, or his agents agrees to furnish the ship in writing prior to the departure from Puna, Ecuador instructions as to the temperature at which this refrigerator chamber is to be maintained with a range for the delivery air within 5 degrees Fahrenheit. In the event that these instructions are not delivered by the Shipper or his agents, the Grace Line will exercise due judgment, maintaining proper refrigeration based on experience.

6. Grace Line shall whenever possible notify the Shipper or his agents in Guayaquil, Ecuador and New York respectively forty-eight (48) hours and again twenty-four (24) hours in advance of the expected hour of arrival of each vessel at each of said ports.

7. At New York bananas are to be discharged at a terminal designated by Grace Line Inc. to dock and/or lighters. Trucks and lighters are to be furnished by the Shipper or his agents and shall be made available to the vessel immediately upon arrival, and delivery shall be taken as fast as can be effected by the vessel. The actual discharge from the vessel and stowing in lighters as well as discharge to the dock shall be performed by the stevedores designated by the Grace Line at actual cost for account and cargo risk of the Shipper unless some other basis is mutually agreed.

8. The Shipper guarantees the use of the compartment for bananas as hereinbefore specified during the entire year. The Shipper shall pay Grace Line Inc, for the transportation of bananas hereunder at the rate of Twenty-Nine Dollars (\$29.00) U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight charges are due [fol. 604] and payable in New York City, New York upon cable advice that vessel has reported for loading, fruit loaded or not loaded, vessel lost or not lost. Proper outturn weight certificates are to be furnished to the Grace Line Inc. in New York within one week after discharge of each vessel.

9. The Shipper guarantees Grace Line Inc. a minimum payment of freight charges of Four Thousand Seven Hundred and Fifty Dollars (\$4,750.00) U.S. Currency per vessel for the transportation of bananas hereunder.

10. Grace Line usual form of bill of lading shall be issued for all bananas transported hereunder without prejudice to this agreement, and where terms of the bill of lading are in conflict with the terms of this agreement, the terms of this agreement shall prevail.

11. Neither party shall be responsible for any default or delay in the performance of its obligation hereunder due to strikes, acts of God, of the public enemy, war declared or undeclared, including the act of any belligerent therein, riot, rebellion, revolution, blockade, embargo, quarantine, collision, perils of the sea or requirement, regulation, restriction or other act of any legally established government or revolutionary government.

12. It is mutually agreed that this contract may be cancelled by the Grace Line upon one hundred and twenty (120) days written notice to the Shipper, or as may be required by the United States Government or any agency thereof. If an order of the Federal Maritime Board shall be entered pursuant to its report of June 23, 1953, this contract shall terminate on the date such order becomes final either by virtue of Grace Line's failure to appeal from it within the time limited by law, or by virtue of its final affirmance in any court of competent jurisdiction.

13. It is further understood that if after one year from the effective date of this contract the Shipper is prevented from meeting minimum freight charges solely because of the Sigatoka disease, this agreement may be cancelled by the Shipper upon ninety (90) days written notice to the Grace Line Inc.

[fol. 605] 14. The Shipper hereby agrees to deposit in any bank designated by the Grace Line the sum of Fifty Thousand Dollars (\$50,000) U.S. Currency, in cash or in securities acceptable to the Grace Line, as a guarantee of

prompt payment of freight charges due and as a bond for fulfillment of the terms and conditions of this contract. This deposit shall be held in the name of the Grace Line and shall be returned to the Shipper not later than thirty (30) days after expiration of this contract or any termination thereof as specified herein.

15. This agreement shall become effective with the loading of the first vessel made available to the Shipper in accordance with this contract, after September 1, 1953, and shall remain in effect for two (2) years from that date thereafter.

16. The terms and provisions of this agreement shall extend to and include the subsidiary companies of the parties wherever applicable.

17. This agreement may be further extended by mutual consent of both parties.

GRACE LINE INC.

By

/s/ J. E. MAGNER,
Senior Vice-President

ACCEPTED:

By

/s/ PHILIP R. CONSOLO

March 24, 1955

Mr. Philip R. Consolo
Atlantic Fruit & Steamship Co., Inc.
30 Vesey Street
New York, N. Y.

Dear Mr. Consolo:

Kindly refer to the Agreement entered into between us on the 15th day of July, 1953, for the transportation of bananas from Ecuador to New York on the Santa passenger vessels presently employed by Grace Line in that trade.

In accordance with your request and as provided in Article 17 thereof, we hereby agree that said Agreement is further extended on the same terms and conditions until approximately June 30, 1957.

Yours very truly,

GRACE LINE INC.

/s/ James E. Magner
Senior Vice President

Accepted.

/s/ Philip R. Consolo

[fol. 607]

GRACE LINE
Hanover Square
New York 4, N. Y.

July 20, 1955

Mr. Philip R. Consolo
c/o Atlantic Fruit & Steamship Co.
30 Vesey Street
New York 7, New York

Dear Mr. Consolo:

This will refer to our recent discussions concerning the necessity of a moderate upward adjustment in the rate on bananas.

As explained to you, this upward adjustment is necessary in view of increased operating costs occurring over the last two years. Such increased costs are not confined to our service in particular, but are general in all trades. You will recall our showing you photographic copies of press clippings concerning rate increases placed in effect early this year by carriers operating world-wide services. Therefore, as agreed between us, effective September 1, 1955, with all sailings from Ecuador the freight rate on bananas will be \$31.00 U.S. Currency per ton of 2,000 pounds based on outturn weights.

We believe this warranted increase is reasonable, and we sincerely appreciate your understanding and willingness to cooperate in this matter.

This letter is submitted in triplicate, and we would ask you to sign and return two copies at your earliest convenience.

Very truly yours,
GRACE LINE INC.

James E. Magner
Senior Vice President

In Triplicate

Accepted:

Philip R. Consolo

[fol. 608]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 41

CONSOLIDA BANANA PURCHASE AND SALE EXPERIENCE

FMB Docket 827
Exhibit 41
Page 4 of 6

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolid Stems Shipped	(6) Cost in Sueros	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
237	Santa Isabel	2/11/57	2/25/57 2/	3576	109,333.03	18.84	\$6,896.54	3645	309,650	\$21,162.38	\$19,186.73	\$12,290.19	\$3.572
238	Santa Cecilia	2/23/57	3/4/57 2/	4360	132,505.01	18.84	8,366.17	4522	380,780	20,275.57	18,765.79	10,399.62	2.300
239	Santa Ines	2/25/57	3/7/57 2/	5237	159,126.79	18.84	10,047.34	5431	440,290	17,574.62	16,095.25	6,045.91	1.113
240	Santa Maria	3/2/57	3/11/57 2/	4150	129,726.21	18.08	8,235.58	4407	364,000	20,366.68	19,042.55	10,806.97	2.452
241	Santa Margarita	3/8/57	3/18/57 2/	4290	134,856.30	18.08	8,555.09	4339	386,350	24,472.35	22,898.83	14,343.74	3.346
242	Santa Olivia	3/10/57	3/20/57	6115	177,711.17	18.08	11,391.73	5998	494,495	30,550.27	28,983.43	17,591.70	2.933
243	Santa Barbara	3/24/57	4/2/57	4457	131,359.24	18.08	8,404.35	4407	377,940	19,313.78	18,072.40	9,668.05	2.194
244	Santa Isabel	3/28/57	4/7/57	4150	121,952.43	18.08	7,805.61	4114	359,190	20,280.10	18,764.36	10,958.75	2.644
245	Santa Rita	4/2/57	4/12/57	5590	163,853.17	17.70	10,536.31	5480	473,090	25,916.33	24,557.94	14,021.63	2.559
246	Santa Cecilia	4/5/57	4/15/57	4274	124,708.73	17.70	8,423.64	4168	357,400	22,280.35	20,916.25	12,892.61	3.093
247	Santa Elisa	4/8/57	4/18/57	4773	138,785.45	17.70	8,233.11	4694	402,550	20,072.45	18,920.45	9,987.34	2.188
248	Santa Maria	4/13/57	4/23/57	3707	108,889.79	17.70	7,000.18	3607	307,170	17,988.45	16,490.34	9,490.16	2.631
249	Santa Ines	4/16/57	4/26/57	4464	132,220.08	17.70	8,491.48	4363	358,670	19,063.95	18,048.67	9,557.19	2.191
250	Santa Margarita	4/19/57	4/29/57	4501	131,722.13	17.70	8,471.82	4432	376,260	21,121.82	19,576.43	11,104.61	2.506
251	Santa Barbara	4/30/57	5/9/57	4233	124,473.37	17.70	8,000.95	4132	362,860	23,013.29	21,337.65	13,336.70	3.228
252	Santa Luisa	5/3/57	5/13/57	4000	118,749.18	17.80	7,615.12	3841	342,140	20,660.14	19,182.81	11,567.69	3.012
253	Santa Olivia	5/6/57	5/16/57 2/	5000	146,543.74	17.80	9,412.57	4973	416,535	24,381.09	22,518.00	13,105.43	2.635
254	Santa Isabel	5/11/57	5/21/57	4360	128,356.72	17.80	8,239.82	4219	372,420	22,198.75	20,643.30	12,403.48	2.940
255	Santa Cecilia	5/18/57	5/28/57	4040	117,829.36	17.80	7,572.89	3983	337,780	22,536.13	20,988.29	13,415.40	3.368
256	Santa Rita	5/21/57	5/30/57	5120	147,282.82	17.80	9,482.41	5031	418,350	30,482.31	28,489.30	19,006.89	3.778
257	Santa Maria	5/25/57	6/4/57	4030	113,219.45	17.80	7,311.54	3939	322,000	27,881.90	26,033.33	18,721.79	4.753
258	Santa Margarita	5/31/57	6/10/57	4245	123,679.94	17.80	7,949.94	4138	345,610	32,190.15	30,408.23	22,458.29	5.427
259	Santa Elisa	6/8/57	6/17/57 2/	6115	178,867.24	17.56	11,523.28	5982	472,635	39,448.34	37,644.93	26,121.65	4.367
260	Santa Barbara	6/9/57	6/18/57	4196	122,293.25	17.56	7,881.88	4089	349,000	29,994.01	28,311.35	20,429.47	4.996
261	Santa Luisa	6/15/57	6/25/57	4285	124,646.83	17.56	8,035.38	4180	347,700	28,562.08	26,923.72	18,888.34	4.519
262	Santa Isabel	6/21/57	7/1/57	4529	132,718.78	17.56	8,548.41	4402	364,610	24,656.02	22,726.52	14,178.11	3.221
263	Santa Ines	6/22/57	7/2/57	4209	123,299.17	17.56	7,942.01	4136	328,600	21,398.27	20,107.87	12,165.86	2.941
264	Santa Cecilia	6/28/57	7/9/57	4766	144,846.99	17.56	9,290.91	4601	364,710	23,899.90	22,266.11	12,975.20	2.820
265	Santa Maria	7/7/57	7/17/57	4866	147,429.54	17.34	9,487.27	4744	365,810	26,584.85	25,249.25	15,761.98	3.323
266	Santa Olivia	7/11/57	7/22/57	5630	170,182.37	17.34	10,954.08	5445	445,335	27,670.77	26,130.75	15,176.67	2.787

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Sueros per stem; Official rate (15.00 Sueros Per Dollar) Applied to First 22.50 Sueros Per Stem.

Notes: 2/ Lower count for Exchange computation.

[fol. 609]

CONSOLO BANANA PURCHASE AND SALE EXPERIENCE

FMS Booklet 027
Exhibit 4/
Page 5 of 6

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolo Stems Shipped	(6) Cost in Sueros	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
267	Santa Margarita	7/14/57	7/24/57	4424	135,234.31	17.34	\$ 8,694.50	4345	329,430	\$23,665.07	\$21,702.29	\$13,007.79	\$2.994
1	Santa Barbara	7/19/57	7/30/57	4112	125,385.82	17.34	8,069.45	4056	296,390	20,982.50	19,934.00	11,864.55	2.925
2	Santa Rita	7/26/57	8/6/57	4885	151,987.04	17.34	9,749.92	4797	366,985	26,012.54	26,867.47	17,117.56	3.568
3	Santa Luisa	7/27/57	8/5/57	4186	128,540.28	17.34	8,260.27	3999	308,670	22,363.42	21,360.20	13,099.99	3.276
4	Santa Isabel	8/2/57	8/12/57	4833	145,498.17	17.20	9,386.46	4794	354,440	27,807.62	26,413.10	17,086.64	3.592
5	Santa Cecelia	8/10/57	8/20/57	4814	145,734.15	17.20	9,396.53	4658	362,030	26,582.75	25,271.06	15,874.53	3.408
6	Santa Elisa	8/12/57	8/21/57	6750	204,859.08	17.20	13,205.47	6669	490,710	34,165.20	32,423.23	19,217.76	2.882
7	Santa Maria	8/17/57	8/27/57	4840	152,742.32	17.20	9,008.97	4751	370,130	25,166.80	23,553.26	13,744.29	2.899
8	Santa Ines	8/20/57	8/29/57	5965	180,410.49	17.20	11,633.43	5835	444,665	22,642.52	21,866.05	10,232.62	1.754
9	Santa Margarita	8/24/57	9/3/57	4317	131,740.86	17.20	8,487.61	4170	320,870	18,144.32	15,867.92	7,380.31	1.770
10	Santa Barbara	8/31/57	9/10/57	4710	144,882.61	17.20	9,327.07	4533	355,750	21,763.00	20,369.47	11,042.40	2.436
11	Santa Olivia	9/6/57	9/16/57	5346	162,670.89	17.24	10,477.58	5278	392,780	26,144.84	24,325.13	13,847.55	2.644
12	Santa Luisa	9/7/57	9/17/57	3851	118,237.13	17.24	7,608.05	3741	285,650	19,898.09	18,982.77	11,373.92	3.040
13	Santa Isabel	9/14/57	9/24/57	4744	142,866.58	17.24	9,211.51	4655	346,380	24,422.55	22,988.67	13,777.16	2.960
14	Santa Rita	9/20/57	9/30/57	4486	137,944.21	17.24	8,875.71	4299	303,720	20,977.16	19,711.57	10,895.86	2.921
15	Santa Cecelia	9/21/57	10/1/57	5036	153,128.42	17.24	9,863.65	4819	358,010	27,618.15	26,211.83	16,348.18	3.392
16	Santa Maria	9/27/57	10/9/57	4892	150,761.66	17.24	9,698.31	4829	352,240	28,644.15	27,322.07	17,623.76	3.650
17	Santa Elisa	10/4/57	10/14/57	5810	176,397.92	17.15	11,378.11	5701	392,450	29,832.88	28,574.40	17,196.29	3.016
18	Santa Margarita	10/5/57	10/15/57	4752	143,845.59	17.15	9,281.10	4693	334,230	24,810.55	23,509.89	14,228.79	3.032
19	Santa Ines	10/11/57	10/21/57	6132	187,589.12	17.15	12,091.24	6109	422,580	32,144.58	29,644.03	17,572.79	2.877
20	Santa Olivia	10/26/57	11/4/57	5405	168,005.52	17.15	10,812.63	5348	376,155	24,109.92	22,427.71	11,615.08	2.172
21	Santa Catalina	11/2/57	11/11/57	6520	203,679.33	16.90	13,151.56	6496	431,230	22,041.47	20,525.27	7,373.71	1.135
22	Santa Rita	11/12/57	11/21/57	5700	179,141.57	16.90	11,561.34	5551	391,095	22,337.96	21,058.94	9,497.60	1.711
23	Santa Teresa	11/16/57	11/25/57	5764	188,265.67	16.90	12,112.02	5602	392,350	19,049.50	17,710.95	5,598.99	.999
24	Santa Elisa	11/23/57	12/3/57	6280	202,448.44	16.90	13,038.25	6254	444,735	19,444.74	18,397.80	5,359.55	.857
25	Santa Ines	11/28/57	12/9/57	6466	214,320.42	16.90	13,772.10	6334	443,440	15,163.35	14,204.43	432.33	.068
26	Santa Ana	12/7/57	12/16/57	5407	179,561.40	16.57	11,605.00	5348	396,980	14,231.75	13,571.51	1,966.51	.368
27	Santa Olivia	12/14/57	12/23/57	5530	179,923.02	16.57	11,644.31	5409	408,165	20,775.29	19,703.31	8,059.00	1.490
28	Santa Catalina	12/21/57	12/30/57	4023	130,075.60	16.57	8,421.83	3980	307,670	16,977.98	15,826.91	7,405.08	1.861
29	Santa Rita	12/30/57	1/9/58	5526	176,955.74	16.57	11,464.66	5416	431,335	25,711.68	24,683.34	13,218.68	2.441

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Sueros per stem; Official rate (15.00 Sueros Per Dollar) Applied to First 22.50 Sueros Per Stem.

[fol. 610]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 42

COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

FMB Docket 827
Exhibit 42
Page 3 of 5

I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Philadel- phia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Console Ship	Console Profit/Stem Before Stew. and Freight	Total Profit Before Stew. & Freight (5) x (8)	Total Stew. at 35¢/Stem (St. Phila.) (5) x 35¢	Total Stew. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stew. (9)-(6)-(10)	1/3 Profit at 35¢ Stew. (12) ÷ 3	Net Profit at 48.8¢ Stew. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stew. (14) ÷ 3
65	74-N	Quito	2/17/57	2/27/57	8,155	\$10,000.00	2/11/57	\$3,372	\$ 27,498.66	\$ 2,854.25	\$ 3,979.64	\$ 14,644.41	\$ 4,881.47	\$13,519.02	\$ 4,506.34
66	35-N	Cali	2/24/57	3/6/57	11,732	11,732.00	2/23/57	2,300	26,983.60	4,106.20	5,725.22	11,145.40	3,715.13	9,526.38	3,175.46
67	80-N	Manisales	3/2/57	3/12/57	5,700	7,000.00	3/2/57	2,452	13,976.40	1,995.00	2,781.60	4,981.40	1,660.46	4,154.80	1,384.93
68	61-N	Medellin	3/19/57	3/29/57	10,251	10,251.00	3/24/57	2,194	22,490.69	3,587.85	5,002.49	8,651.84	2,883.94	7,237.20	2,412.40
69	36-N	Ibagua	3/28/57	4/7/57	12,543	14,500.00	3/28/57	2,664	33,444.55	4,390.05	6,120.98	14,524.50	4,841.50	12,799.57	4,266.52
70	75-N	Quito	4/4/57	4/15/57	8,364	10,000.00	4/5/57	3,093	25,869.85	2,927.40	4,081.63	12,942.45	4,314.15	11,708.22	3,902.74
71	36-N	Cali	4/11/57	4/21/57	11,903	11,903.00	4/13/57	2,631	31,316.79	4,166.05	5,808.66	15,247.74	5,082.58	13,605.13	4,535.04
72	89-N	Manisales	4/22/57	5/1/57	5,041	7,000.00	4/19/57	2,506	12,632.75	1,744.35	2,460.01	3,668.40	1,222.80	3,172.74	1,057.58
73	60-N	Medellin	4/26/57	5/6/57	10,693	13,000.00	4/30/57	3,228	34,517.00	3,742.55	5,218.18	17,774.45	5,924.81	16,258.82	5,419.61
74	37-N	Ibagua	5/1/57	5/11/57	12,035	14,500.00	4/30/57	3,228	38,848.98	4,212.25	5,873.08	20,136.73	6,712.24	18,475.90	6,158.63
75	76-N	Quito	5/9/57	5/19/57	8,782	10,000.00	5/11/57	2,940	29,819.08	3,073.70	4,205.62	12,745.38	4,248.46	11,533.46	3,844.48
76	37-N	Cali	5/16/57	5/27/57	10,382	14,500.00	5/18/57	3,368	34,966.58	3,633.70	5,066.42	16,832.88	5,610.96	15,400.16	5,133.38
77	90-N	Manisales	5/22/57	6/2/57	5,749	7,000.00	5/21/57	3,778	21,719.72	2,012.15	2,805.51	12,707.57	4,235.85	11,914.21	3,971.40
78	63-N	Medellin	5/31/57	6/12/57	11,547	13,000.00	5/31/57	5,127	62,665.57	4,041.45	5,634.94	15,624.12	5,208.04	14,090.63	4,696.87
79	38-N	Ibagua	6/6/57	6/16/57	13,022	14,500.00	6/8/57	4,367	56,867.07	4,557.70	6,354.74	37,809.37	12,603.12	36,012.33	12,004.11
80	77-N	Quito	6/14/57	6/25/57	8,286	10,000.00	6/15/57	4,519	37,444.43	2,900.10	4,043.57	24,544.33	8,181.44	23,400.86	7,800.28
81	38-N	Cali	6/17/57	6/29/57	13,770	14,500.00	6/15/57	4,519	62,226.63	4,819.50	6,719.76	12,907.13	4,302.37	11,006.87	3,668.95
82	91-N	Manisales	6/24/57	7/6/57	6,174	7,000.00	6/22/57	2,941	18,157.73	2,160.90	3,012.91	8,956.83	2,988.94	8,144.82	2,714.94
83	64-N	Medellin	7/5/57	7/17/57	11,278	13,000.00	7/7/57	3,323	37,476.79	3,947.30	5,503.66	20,529.49	6,843.16	18,973.13	6,324.37
84	39-N	Ibagua	7/10/57	7/20/57	13,440	14,500.00	7/11/57	2,787	37,457.28	4,704.00	6,558.72	18,253.28	6,084.42	16,398.56	5,466.18
85	78-N	Quito	7/17/57	7/28/57	9,222	10,000.00	7/19/57	2,925	26,974.35	3,227.70	4,500.34	13,746.65	4,582.21	12,474.01	4,158.00
86	39-N	Cali	7/19/57	8/3/57	11,600	13,105.00	7/19/57	2,925	33,990.00	4,060.00	5,660.80	16,765.00	5,588.33	15,164.20	5,054.73
87	3-N	Tunja	7/31/57	8/12/57	13,059	15,950.00	8/2/57	3,552	46,385.57	4,570.65	6,372.79	25,864.92	8,621.64	24,062.78	8,020.92
88	92-N	Manisales	8/6/57	8/18/57	6,287	7,700.00	8/10/57	3,408	21,426.10	2,200.45	3,068.06	11,525.65	3,841.88	10,658.04	3,552.68
89	40-N	Ibagua	8/13/57	8/24/57	13,387	15,950.00	8/12/57	2,382	38,581.33	4,685.45	6,532.86	17,945.88	5,981.96	16,098.47	5,366.15
90	79-N	Quito 2/	8/22/57	9/4/57	8,735	11,000.00	8/20/57	1,754	15,321.19	3,057.25	4,268.68	1,263.94	421.31	58.51	19.50
91	40-N	Cali	8/27/57	9/8/57	13,364	15,950.00	8/24/57	1,770	23,548.08	4,656.40	6,492.35	2,941.68	980.56	1,105.73	368.57
92	4-N	Tunja	9/6/57	9/16/57	14,368	15,950.00	9/6/57	2,624	37,701.63	5,028.80	7,011.58	16,722.83	5,574.27	14,740.05	4,913.35
93	93-N	Manisales	9/8/57	9/21/57	5,827	7,700.00	9/7/57	3,040	17,714.08	2,039.15	2,843.58	7,974.63	2,658.21	7,170.50	2,390.16
94	41-N	Ibagua	9/17/57	9/28/57	12,776	15,950.00	9/14/57	2,550	37,816.96	4,471.60	6,234.69	17,395.36	5,798.45	15,632.27	5,210.75
95	80-N	Quito	9/25/57	10/7/57	9,241	11,000.00	9/27/57	3,050	33,729.65	3,234.35	4,509.61	19,495.30	6,498.43	18,220.04	6,073.34
96	41-N	Cali	10/5/57	10/12/57	11,714	13,247.50	10/4/57	3,016	35,329.12	4,099.90	5,716.13	17,982.02	5,994.00	16,365.49	5,455.16

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbianna records, Puerto Bolivar date is shown.
2/ Baltimore arrival, no Philadelphia call.

[fol. 611]

COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

FMS Docket 827
Exhibit 12
Page 4 of 5

I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Phila- delphia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Consolo Ship	Consolo Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5 x (8))	Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12)÷3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
97	5-W	Tunja	10/8/57	10/18/57	15,395	\$15,950.00	10/5/57	\$3.032	\$46,677.64	\$5,388.25	\$7,512.76	\$25,339.39	\$8,446.16	\$23,214.88	\$7,738.29
98	4-W	Manisales	10/17/57	10/28/57	6,159	7,700.00	10/11/57	2.877	17,719.44	2,155.65	3,005.59	7,863.79	2,621.26	7,013.85	2,337.95
99	42-W	Ibague	10/23/57	11/4/57	12,848	15,950.00	10/26/57	2.172	27,905.86	4,496.80	6,269.82	7,459.06	2,486.35	5,686.04	1,895.34
100	81-W	Quito	10/29/57	11/8/57	9,495	11,000.00	10/26/57	2.172	20,623.14	3,323.25	4,633.56	6,299.89	2,099.96	4,989.58	1,663.19
101	42-W	Cali	11/6/57	11/17/57	11,240	12,655.00	11/2/57	1.135	12,757.40	3,994.00	5,495.12	(3,831.60)	(1,277.20)	(5,382.72)	(1,794.24)
102	6-W	Tunja	11/12/57	11/22/57	9,480	10,455.00	11/12/57	1.711	16,220.29	3,318.00	4,626.24	2,447.28	815.76	1,139.04	379.68
103	67-W	Medellin	11/18/57	11/28/57	6,776	8,800.00	11/16/57	.999	6,769.22	2,371.60	3,306.69	(4,402.38)	(1,467.16)	(5,337.47)	(1,779.15)
104	43-W	Ibague	11/23/57	12/6/57	13,084	15,950.00	11/23/57	.857	11,212.99	4,579.40	6,384.99	(9,316.41)	(3,105.47)	(11,122.00)	(3,707.33)
105	82-W	Quito	12/9/57	12/17/57	7,880	8,845.00	12/7/57	.368	2,899.84	2,758.00	3,845.44	(8,703.16)	(2,901.05)	(9,790.60)	(3,263.53)
106	7-W	Tunja	12/15/57	12/24/57	8,232	10,230.00	12/14/57	1.490	12,265.68	2,881.20	4,017.22	(845.52)	(281.04)	(1,981.54)	(660.51)
107	68-W	Medellin	12/23/57	1/3/58	9,050	10,112.50	12/21/57	1.861	16,842.05	3,167.50	4,416.40	3,562.05	1,187.35	2,313.15	771.05
108	44-W	Ibague	1/1/58	1/11/58	12,239	15,950.00	12/30/57	2.441	29,875.40	4,283.65	5,972.63	9,641.75	3,213.58	7,992.77	2,650.92
109	83-W	Quito	1/12/58	1/23/58	8,110	11,000.00	1/13/58	3.318	26,908.98	2,838.50	3,957.68	13,070.48	4,356.82	11,951.30	3,983.76
110	44-W	Cali	1/17/58	1/28/58	11,785	15,950.00	1/20/58	3.135	36,945.98	4,124.75	5,751.08	16,871.23	5,623.74	15,244.90	5,081.63
111	8-W	Tunja	1/24/58	2/3/58	12,903	15,950.00	1/27/58	2.410	31,096.23	4,516.05	6,296.66	10,630.18	3,543.39	8,849.57	2,949.85
112	69-W	Medellin	2/2/58	2/14/58	11,072	14,300.00	2/2/58	1.870	20,704.64	3,875.20	5,403.14	2,529.44	843.14	1,001.50	333.83
113	45-W	Ibague	2/8/58	2/20/58	10,014	11,122.50	2/7/58	1.117	11,185.64	3,504.90	4,896.83	(3,441.76)	(1,147.25)	(4,823.69)	(1,607.89)
114	4-W	N. Mejia	2/16/58	2/25/58	9,767	10,813.75	2/17/58	1.452	14,181.68	3,418.45	4,766.30	(50.52)	(16.04)	(1,398.37)	(466.12)
115	84-W	Quito	2/24/58	3/7/58	8,276	11,000.00	2/17/58	1.452	12,016.75	2,896.60	4,038.69	(1,879.85)	(626.61)	(3,021.54)	(1,007.31)
116	45-W	Cali	3/4/58	3/14/58	12,373	15,950.00	3/3/58	2.304	28,507.39	4,330.55	6,036.02	8,226.04	2,742.28	6,519.37	2,173.12
117	9-W	Tunja	3/11/58	3/21/58	11,333	12,771.25	3/9/58	1.937	21,952.02	3,966.55	5,530.50	5,214.22	1,738.07	3,690.27	1,216.75
118	70-W	Medellin	3/18/58	3/29/58	8,666	9,632.50	3/20/58	1.340	11,612.44	3,033.10	4,229.01	(1,053.16)	(351.05)	(2,249.07)	(749.69)
119	46-W	Ibague	3/25/58	4/4/58	12,776	16,109.50	3/29/58	.880	11,242.98	4,471.60	6,234.69	(9,338.22)	(3,112.74)	(11,101.31)	(3,700.43)
120	5-W	N. Mejia	4/2/58	4/13/58	7,000	9,389.21	3/29/58	.880	6,160.00	2,450.00	3,416.00	(5,679.21)	(1,895.07)	(6,645.21)	(2,215.07)
121	85-W	Quito	4/15/58	4/17/58	6,751	8,396.89	3/29/58	.880	5,940.08	2,362.85	3,294.49	(4,818.06)	(1,606.28)	(5,750.50)	(1,916.83)
122	46-W	Cali 2/	5/2/58	5/12/58	6,383	8,144.39	4/22/58	2.765	17,649.00	2,234.05	3,114.90	7,270.56	2,423.52	6,389.71	2,129.90
123	10-W	Tunja	4/24/58	5/3/58	6,137	8,080.00	4/22/58	2.765	16,968.81	2,147.95	2,994.86	6,740.86	2,246.95	5,895.95	1,964.65
124	71-W	Medellin	4/29/58	5/10/58	6,667	8,617.83	4/28/58	2.600	17,334.20	2,333.45	3,253.30	6,382.92	2,127.64	5,462.87	1,820.95
125	47-W	Ibague	5/5/58	5/17/58	6,122	8,877.90	5/10/58	1.653	10,119.67	2,142.70	2,987.54	(900.93)	(300.31)	(1,745.77)	(581.92)
126	6-W	Mejia	5/19/58	5/19/58	5,745	8,080.00	5/21/58 3/	1.653	9,496.49	2,010.75	2,803.56	(594.26)	(198.08)	(1,387.07)	(462.35)
127	3-W	Cartagena de Indias	5/27/58	5/27/58	8,006	9,981.33	5/26/58 3/	.938	7,509.63	2,802.10	3,906.93	(5,273.80)	(1,757.93)	(6,378.63)	(2,126.21)
128	47-W	Cali	6/6/58	6/19/58	6,197	8,080.00	6/4/58 3/	1.219	7,554.14	2,168.95	3,024.14	(2,694.81)	(898.27)	(3,550.00)	(1,183.33)

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.
2/ Baltimore arrival, no Philadelphia call.
3/ Consolo arrival date @ N. Y.

[fol. 612]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 110

BALTIMORE STEVEDORING
GRANCOLOMBIANA ARRIVALS

9/18/59 - 4/15/60

Ship- ment No.	SHIP	DATE	TONS OUT- TURN	COST	COST PER TON
1	CARTEGENA des INDIAS	9/18/59	493.995	\$ 6,104.44	\$12.36
2	TUNJA	9/25	476.971	5,786.05	12.13
3	BARRANQUILLA	9/30	497.525	6,159.40	12.38
4	GUA YAQUIL	10/9	481.515	8,139.55	16.90
5	MANUEL MEJIA	10/15	425.188	5,323.42	12.52
6	PASTO	10/22	413.678	6,945.34	16.79
7	CARTEGENA des INDIAS	10/29	476.230	5,978.86	12.55
8	TUNJA	11/6	352.733	5,125.94	14.53
9	BARRANQUILLA	11/20	410.978	5,057.81	12.31
10	GUA YAQUIL	11/27	458.330	5,133.02	11.20
11	MANUEL MEJIA	12/3	422.000	4,963.08	11.76
12	PASTO	12/11	407.780	4,007.10	9.83
13	CARTEGENA des INDIAS	12/18	506.720	6,528.33	12.88
14	TUNJA	12/23	421.865	7,584.77	17.98
15	BARRANQUILLA	12/30	467.548	7,336.80	15.69
16	GUA YAQUIL	1/7/60	482.675	5,329.91	11.04
17	MANUEL MEJIA	1/15	445.885	5,393.45	12.10
18	PASTO	1/21	465.275	4,438.06	9.54
19	CARTEGENA des INDIAS	1/29	536.688	5,178.89	9.64
20	TUNJA	2/5	486.025	7,388.14	15.20
21	BARRANQUILLA	2/12	535.762	7,273.45	13.58
22	GUA YAQUIL	2/19	482.113	5,085.82	10.55
23	MANUEL MEJIA	2/26	497.490	6,797.23	13.66
24	PASTO	3/4	505.800	8,026.65	15.87
25	CARTEGENA des INDIAS	3/11	532.908	4,983.50	9.35
26	TUNJA	3/18	477.785	4,640.01	9.71
27	BARRANQUILLA	3/25	497.487	5,127.80	10.31
28	GUA YAQUIL	4/1	550.310	5,088.41	9.25
29	MANUEL MEJIA	4/8	516.360	5,387.43	10.43
30	PASTO	4/15	547.637	6,804.98	12.43
			14,273.256	\$177,117.64	\$12.41

[fol. 613]

BEFORE THE FEDERAL MARITIME BOARD

Docket Nos. 827, 835

In the Matter of:

PHILIP R. CONSOLO,

v.

FLOTA MERCANTE GRANCOLOMBIANA, et al.,

and

PANAMA ECUADOR SHIPPING CORPORATION.

Transcript of Proceedings (Excerpts)

Room 4519
 GAO Building
 Washington, D. C.

PREHEARING CONFERENCE—May 7, 1958

Prehearing conference in the above-entitled matter was convened, pursuant to notice, at 10:00 a.m., before C. W. ROBINSON, Examiner.

* * * * *

PROCEEDINGS

Examiner Robinson: Gentlemen, if you are ready, we'll go ahead. As you know, we are here for a prehearing conference on 827 and 835, the first being a complaint case, the other proceeding involving a declaratory order on bananas from Ecuador to the United States.

* * * * *

Examiner Robinson: Who is public counsel?

Mr. Blackwelder: Public counsel intervened, Mr. Examiner, and petition has been granted. I'd like to make appearances for Edward Aptaker, Robert J. Blackwelder, and Robert B. Hood.

* * * * *

[fol. 614] Examiner Robinson: * * * If no one has anything, I have a question I would like to ask. Maybe I'm speaking out of turn, but I'd like to know why Panama Ecuador Shipping Corporation was sued as the respondent? Why has somebody not made a motion to dismiss this?

Mr. Turk: Well, if that is within the scope of the subject of simplification of issues, why we would like to state that our position now is that we are not a proper respondent, not being either a common carrier by water or another person subject to the Shipping Act of 1916, as amended; and that accordingly we should be relieved of participation by the dismissal of the complaint as to us. That seems to us to be sufficiently clear so that it might be done by stipulation here and now, rather than by a written motion and memoranda and so forth to the board. I propose, if it is in order, to do so now.

Mr. Kharasch: Mr. Robinson, our understanding is that Panama Ecuador Shipping Corporation is the exclusive contractor at present for all of the shipping space aboard the ships of Grancolombiana in this trade.

We think that this is sufficient, since they are contractors for space aboard a common carrier, to make them a person subject to the Act.

* * * * *

Examiner Robinson: Just so that my position might be clear, I do not have jurisdiction to dismiss. That would have to be for the Board. My own view is that they have no business being in here as a respondent. Coming in as an intervenor as their interests might appear is one thing, but they can't confer jurisdiction on the Board—I understand why you want to do it, naturally, being the other party of the contract.

* * * * *

Mr. Kharasch: We have distributed, Mr. Examiner, a four-page document which is filed both under Rule 6(d) and under the Board's new procedure recently promulgated in The Federal Register, which appears as 46 C.F.R. Section

201.211. That is presumably going to appear in due time as a rule of the Board. That's the section providing for [fol. 615] discovery and production of documents for inspection and copying prior to hearing.

* * * * *

We would be pleased to have the responses of the two respondents in Docket 827 to our motion, our demand.

Mr. Giallorenzi: Mr. Robinson, I have looked this motion over rather hurriedly this morning. It was just handed to me. I think some of the items can readily be made available to counsel for Philip R. Consolo. However, there are a number of items which I think are confidential which I do not believe should be disclosed by Mr. Consolo; and also a number of the items are extremely burdensome and oppressive and I would like to have the opportunity to file papers in opposition to this motion which I will designate with particularity which of these items we do not wish to furnish and those which we will very gladly furnish to our opponents.

Examiner Robinson: I can readily understand why you wouldn't want to answer these now. This is the first time he has seen it, isn't it?

Mr. Kharasch: That's right. We distributed it this morning.

Could this be marked as Exhibit 1 in this prehearing?

Examiner Robinson: Yes.

(The document referred to was marked Exhibit 1.)

Examiner Robinson: I see no reason why he shouldn't have ten days to file a reply. That's what the rules provide for any motion.

This is the first one of these I've had. Is there any reason why he should not have ten day?

Mr. Kharasch: I don't want to rush Mr. Giallorenzi. The customary practice before the Board has just been to distribute lists under Rule 6(d) of information requested at the hearing or before the hearing and most of the time in the prehearing conferences it has usually been occupied

in going down the list and discussing, in front of the Examiner, on the prehearing record the information requested.

Examiner Robinson: Well, they've been very informal things, Mr. Kharasch, as you know, but this is a motion; a [fol. 616] strict motion. It comes under this new procedure and I certainly wouldn't want to rush anybody the first time we've had it. Ten days is not going to kill anybody.

Mr. Kharasch: No, it wouldn't be fair if Mr. Giallorenzi feels he needs more time.

Are you prepared, sir, to discuss any of the items?

Mr. Giallorenzi: No, I'd rather take my full ten days.

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Mr. Kharasch: Perhaps it would help at this point, Mr. Examiner, if we indicated roughly the amount of time we expect our direct case would take. In the preceding two cases, 717 and 771 and 775, the legal or factual issue of common carriage was tried separately from the damages. We intend to be very brief on the common carrier issue. It's not going to take us very long, assuming we get this information here that we have requested to put in our evidence on that issue and we would propose to proceed right away, as part of our direct case, to damages.

We feel the law is clear enough now that there is no saving of time to anyone in trying to separate the cases, as the other cases have been split, so we could offer a rough case of a day—say a day and a half, maybe—for our direct case, including both the damages and the common carriage issue.

Examiner Robinson: Would you have any idea, Mr. Giallorenzi, as to the time? I'm not holding you to it at all.

Mr. Giallorenzi: I'd say about three days.

Mr. Lippman: Three days for your direct case?

Mr. Giallorenzi: Yes.

Examiner Robinson: * * * Now, on the reparation question, I had a little note here. I wondered whether or not it would be sensible to go into that in view of all of this possible reversal. I've found over the years that reparation is a very elusive thing.

Mr. Kharasch: So have most complainants to the Maritime Board.

Examiner Robinson: I anticipate you might have a little [fol. 617] difficulty in a case of this kind. I don't know. You can just say that you've had sales and this, that, and the other. So I'm not sold on it one way or the other. That's one of the questions I wanted to ask.

Does anyone else have any thought on splitting that phase of it?

Mr. Giallorenzi: I agree with you. I think it should be split, especially in view of the pending appeal to be heard, I believe, in the fall.

Examiner Robinson: Has anyone any idea as to when that case is coming up?

Mr. Blackwelder: The Grace Line brief is scheduled to be filed in mid-June of this year, 1958.

The Federal Maritime Board's reply will be filed sometime in October. The Grace Line will then have an opportunity, if they wish, to file a reply brief to the government's brief, leaving a few months for oral argument and ultimate disposition.

I doubt very much whether it will even be decided on the next calendar in the Second Circuit.

Examiner Robinson: You mean even next year?

Mr. Blackwelder: There's a strong possibility it will not be decided next year.

Mr. Kharasch: Mr. Examiner, the decision in Docket 717 has been on the book three years.

Mr. Lippman: More than that. At least four years.

Examiner Robinson: You're talking about the original Consolo case?

Mr. Lippman: Yes.

Mr. Kharasch: That was decided June 23, 1953, almost five years now. Your decision in Docket 771 was confirmed by the Board in the banana distributors' case. We think the legal issues are very clear here. But very clear. The Board's decisions are on the books. The Board's position in the pending case in the Board of Appeals is clearly that the decision was right. The Board is defending its own position. I think in that state of the law it's only proper before this agency to treat the law as decided. It's always

possible on any legal doctrine that some day some appel-
[fol. 618] late court may upset it. The legal issue is so
simple, so clear-cut in our view of this case, that we don't
anticipate a lot of time on it.

* * * * *

Examiner Robinson: Have you an idea how long it will
take you to put in your reparation phase?

Mr. Lippman: The estimate of a day and a half or two
days included the reparation.

Examiner Robinson: On the whole business?

Mr. Lippman: Yes. It seems to us that reparations is
really the only issue in this case, the only issue that hasn't
yet been passed upon by the Board. That's what we are
here for, essentially, and so far as holding things in abey-
ance until the Second Circuit speaks on this petition for
review, I don't think the Board would want to be a party to
any such delay action which would suggest something af-
firmative in the Board's decision.

I think we have to go ahead, irrespective of any peti-
tions for review.

Examiner Robinson: When I issue the notice of hearing
I'll put in there whether or not we'll include the reparation
phase. I'll think about it in the meantime.

Mr. Kharasch: Mr. Giallorenzi, do you anticipate a great
deal of defensive proof on the issue of common carriage?
Is that included in your three-day estimate?

Mr. Giallorenzi: Yes, that is included.

Examiner Robinson: All right. How about the time?

Mr. Lippman: Well, with the pendency of the motion
which Mr. Turk is going to file, and the time it will take
to gather the information, and also the uncertainty as to
whether we are going to have a hearing on reparations
together with the hearing on status, I don't see how we can
possibly have the hearing before some time in September.

Examiner Robinson: Do you want it earlier than that?

Mr. Kharasch: There's a problem of personal conveni-
ence with the summer coming up.

[fol. 619] Examiner Robinson: I was quite surprised when
you said September. Usually people scream for an early

hearing. It really makes no difference to me. I have nothing to consider at this time.

Well, why not leave it this way, then? Let's dispose of all these things first—the motions and this, that, and the other. Then we'll be in more position to find out when it will suit everybody and I'll get in touch with you by letter and let you express yourselves then. Is that satisfactory?

Mr. Giallorenzi: In that regard may I be heard? I have a number of trials coming up this month and in June, and as you undoubtedly know, in the civil courts everybody wants to get his case tried before the summer recess, so I will be pretty busy in the District Courts and State Courts in New York these coming months, which I know will take almost all of my time.

Then of course you have July and August coming along, which is vacation and while I take very limited ones, because I'm a lawyer, I would prefer the early part of September.

* * * * *

Mr. Kharasch: Mr. Robinson, in the event—which we do not anticipate—that you set separate hearings on the issue of common carriage and the issue of reparation, if that division is made, we would like a very early hearing on the issue of common carriage because we think the issues are so simple.

Examiner Robinson: When you say “very early,” do you mean before September?

Mr. Lippman: Yes. My estimate of September included in it the time it would take to gather our evidence in support of our request for reparations, so if you decide to separate the two issues, we'd definitely want to proceed before September.

Mr. Kharasch: One more point, Mr. Examiner, which I should perhaps have mentioned earlier, on the issue of reparations. This probably comes under amendment to the pleading. When we get a date for hearing, we would plan to amend the demand for reparations to run until the date [fol. 620] of hearing. That is to prevent repeated necessity of a later suit for another little chunk of reparations that

would run between the time the complaint was filed and the time the hearing began.

Examiner Robinson: Well, that's a rather involved little thing, so you take care of that in your own way. I don't mean your statement is involved, but that question of bringing forward your reparations and so forth.

Is there anything else anybody wants to talk about?

Mr. Giallorenzi: As I understand this problem, you will decide whether you are going to hear the common carriage issue and reparation issue at the same time?

Examiner Robinson: That's right.

Mr. Kharasch: Would you have a conflict, sir, if—we're talking about what we argue is an unlikely event—but suppose the case were split, would you have a conflict in the next few months that would prevent an early hearing on the issue of common carriage? You mentioned some trials.

Mr. Giallorenzi: Well, as I said, May and June, with the calendars the way they are up there, I anticipate at least three or possibly four trials and it's pretty hard to get adjournments just before the summer time. I might mention I'm on the defense of those cases, so it's really the other people who are pressing.

Examiner Robinson: Well, let me ask you something, Mr. Giallorenzi. This has nothing to do with the prehearing conference, but I was reading through the papers and I notice they speak of there being no compartments in the holds of the vessels. This is general knowledge I wanted to get.

Does that mean you have no bins?

Mr. Giallorenzi: No bins. We just have holds. No bins in any of our ships.

Examiner Robinson: I haven't anything further.

Does anyone else have anything? The prehearing conference is adjourned. (Whereupon, a 10:45 a. m., the prehearing conference was adjourned.)

[fol. 621] FURTHER PREHEARING CONFERENCE—
September 22, 1958

Vol. I

Docket Nos. 827 and 841

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Examiner Robinson: Well, gentlemen, I don't know just where we ought to start this hearing. This hearing is a very informal thing, I hope, and I hope we can arrive at some conclusion on the question of reparation.

I heard this morning that the Grace cases are up for oral argument before the Second Circuit early in December. Had I known it was going to be that soon, I think I would have held off on the reparations in this case. Would anybody like to make a motion to defer reparation in these cases?

Mr. Kharasch: No, sir.

Examiner Robinson: Do you want to continue?

Mr. Giallorenzi: As far as I'm concerned, I would say this: That is the decision of the Board in the Grace Line cases is overruled by the Circuit Court of Appeals, that in my opinion disposes of this matter in its entirety.

I think Mr. Lippman feels that we have been dilatory—at least that I have been dilatory—in this matter in making certain applications. And as far as Grancolombiana is concerned, they would not like to have anyone get the impression that we do not want to proceed with this matter.

But, on the other hand, there is this question or this case which is going to be argued in the Circuit Court of Appeals. I happen to have in my possession the Grace Line brief, and I spoke to Mr. McKay, and, as you have already stated, Mr. Robinson, I think that it will be argued in November or December at the latest. I saw the calendar of the Circuit Court of Appeals on Friday and I did not see the Grace Line case on the calendar. There are about—

Examiner Robinson: I think Mr. Blackwell says it's noted for— What did you say? December 3rd?

Mr. Blackwell: As it stands now, the oral argument will be set for December 5th.

[fol. 622] Mr. Giallorenzi: Then they must have made a special arrangement.

Mr. Blackwell: Stipulation.

Mr. Giallorenzi: Then that accounts for it. So it will be heard on December 5th.

Examiner Robinson: Do you still want to proceed with your reparations?

Mr. Kharasch: Yes.

Mr. Kurrus: Mr. Examiner, in view of the fact that it's going to be heard in December and that thereafter I suppose it could take anywhere from three to six months to get a decision from the Court of Appeals and that somebody could apply for writ to the Supreme Court, are you suggesting that we await the final outcome?

Examiner Robinson: No, I just wondered. I thought perhaps you might want to do it yourself. That's all. I'm just giving you opportunity to say whatever you want.

Mr. Kharasch: No, sir. As Mr. Giallorenzi said, the case could conceivably affect both reparations and the issue of common carriage, but there couldn't be any justification for postponing a piece of it, and we're not willing to postpone the whole thing.

Examiner Robinson: No, I didn't have the whole case in mind. I just meant the reparation phase of it.

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Vol. I

Docket Nos. 827, 835 and 841

Hearing Room 818

November 5, 1958

45 Broadway

New York, N. Y.

Hearing in the above-entitled matters was convened, pursuant to notice at 10:00 A. M., before C. W. Robinson, Examiner.

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[fol. 623] Proceedings

Examiner Robinson: Gentlemen, if we are ready to start. I don't think we have to be formal, we all know these three

proceedings, two separate cases numbers 827 and 841 and the third one petition for declaratory order, which is Docket number 835. Let's try to keep appearances straight for each proceeding. Who appears for the complainant in 827?

Mr. Kharasch: William J. Lippman and Robert N. Kharasch of Galland, Kharasch & Calkins, 1413 K St., Washington, D. C. We also appear for the complainant, Mr. Consolo in Docket 827 and for Mr. Consolo, intervenor in the other case.

Examiner Robinson: Who appears for the respondent in all three proceedings?

Mr. Giallorenzi: Renato C. Giallorenzi and John H. Dougherty of Giallorenzi & Cichanowicz, for Flota Mercante Grancolombiana, S.A., 26 Broadway, New York, N. Y.

Examiner Robinson: Who appears for complainant in 841?

Mr. Page: Richard Kurrus and Paul D. Page, Jr., Suite 423 Washington Building, Washington 5, D. C.

Examiner Robinson: Any appearances for intervenors?

(No Response.)

Examiner Robinson: All right, haven't been announced. Who appears for Public Counsel?

Mr. Blackwell: Robert J. Blackwell appears as Public Counsel in all three cases.

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Vol. II

November 6, 1958

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PHILIP R. CONSOLO was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lippman:

[fol. 624] Q. Will you state your name for the record, Mr. Consolo?

A. Philip R. Consolo.

Q. Where do you reside?

A. 4425 North Michigan Avenue, Miami Beach.

Q. Are you the complainant in Docket 827?

A. Yes, I am.

Q. Are you Philip R. Consolo who was the complainant in Docket 717?

A. Yes, I am.

Q. What is your occupation?

A. I am a banana importer.

Q. How long have you been engaged in the importation of bananas?

A. I would say in the neighborhood of about 15 years.

Q. During that time have you been connected with several importing ventures?

A. Yes, I have.

* * * * *

Q. Are you familiar with the persons who purchased bananas in the United States that you import?

A. Yes.

Q. Have you had dealings with them from time to time?

A. Directly to sell them bananas?

Q. Do you know these people?

A. Yes, I do.

Q. Is it important to them to have bananas arrive on a regular weekly basis?

A. Yes, it is.

Q. Will you tell me why?

A. Well, a purchaser of bananas or a jobber as we refer to, depends on you for a source of supply for bananas, expects at least one shipment a week in order to be in business. Generally, the big companies have two or three, some four arrivals a week, so that a man who uses one car of bananas a week would like to have two or three times purchasers during the week from an importer so that you must have at least a weekly arrival to serve the trade satisfactorily that you are dealing with.

* * * * *

Q. Would you next consider the item for freight paid on fruit to Puna, what does that cover?

A. That covers a freight charge for inland transportation as we refer to it in Ecuador depending on the area where the fruit comes from, but generally if we go to areas [fol. 625] that are further away from Guayaquil we pay less money for the fruit, so to balance off our inland freight charges that when it gets to Puna it would be the same cost per stem.

Mr. Dougherty: In other words, there would not be a difference in expense?

The Witness: As far as Puna is concerned, in other words, if we go to Baba to buy fruit, this is just a figure, and we pay 20 sucres at Baba and the prevailing price is 23 sucres we pay 20 sucres at Baba if we bought bananas at Duran where the transportation is only one sucre to Puna, then generally the price at Duran is 22 sucres so that our cost at Puna for whatever areas we obtain fruit is not any greater.

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Vol. III

November 7, 1958

Q. Mr. Consolo, if you had been able to import an additional volume of bananas since November of 1955, would your selling expenses have been higher or lower?

A. I believe it would have been lower to some degree.

Q. Will you explain your answer?

A. Yes.

Q. Go ahead.

A. If you are employing five thousand stems of bananas and you went to a selling agent or you had to sell them yourself and made a deal with him, he probably would charge you 5 per cent, and that's just a general practice, but if you had fifteen thousand stems or eighteen thousand stems, I am quite sure that as selling agent he would probably take 4 per cent or 3½ per cent for selling the

fruit, because of the larger volume and he has a fixed overhead that he has to overcome.

Mr. Giallorenzi: I move that answer be stricken. The witness says, "I'm quite sure"; he doesn't know—he's positive. It again goes to this point that I have been stressing throughout. There are a lot of ifs and buts as far as damages are concerned, speculative.

Mr. Lippman: Mr. Examiner, Mr. Consolo has been in the business for seventeen years. I think he certainly qualifies as an expert in the trade and he can certainly express his thinking as to what effect the additional volume would have.

[fol. 626] The Witness: I can go further.

Mr. Lippman: Just a second.

Examiner Robinson: Let him go.

The Witness: I can go further and say from the present selling agent and the past selling agent that I had in New York City, they would be very happy to receive 4 per cent instead of 5 if I had the additional volume.

Examiner Robinson: Objection overruled.

Q. Would an additional volume of importations have affected your overhead expenses in any respect?

A. To some degree, yes.

Q. Can you estimate it for us?

A. Well, such as additional cables, extra telephone calls to get reports on that extra cargo, maybe making an occasional trip to New York more frequently, and that's about the situation—the only additional expenses that I would have.

Q. Would you consider it a nominal or a substantial difference?

A. Nominal.

Q. What was your answer?

A. Nominal.

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Q. Are the people shipping bananas on the Grace Line today, the same who had been allocated space as a result of the Board's decision in Docket 717 and Docket 715?

A. No.

Q. Who has fallen by the wayside?

A. Swanee Fruit and Steamship.

Q. How much space do they control?

A. Three-quarters of a chamber.

Q. They are no longer shipping?

A. Since October, 1957—since October, 1958.

Q. Who succeeded to their space?

A. You want the total or you just want one by one?

Q. Let us take each one who has dropped out, and if you can, will you please tell us who now controls the space?

A. I think it would be easier to take the one who dropped out.

Q. As you please.

A. Swanee Fruit and Steamship Company dropped out [fol. 627] with three-quarters of a chamber. Grayson dropped out with one-quarter of a chamber.

Mr. Giallorenzi: Will you give us the dates when they dropped out?

The Witness: This is all 1958, I believe October. I haven't got the exact dates, but I think that's when the changes took over.

A. (Continuing) —El Morro with one-quarter of a chamber, Lebantino with one-half chamber.

Q. Will you tell us who succeeded to the space surrendered, Mr. Consolo?

A. There was Turino, I believe, fell out before October, '58—Turino fell out before 1958. Now, who succeeded the space?

Q. Yes.

A. Banana Distributors increase one-quarter of a chamber, took over Turino, because they were on the same space with Turino.

Q. That was on the freighter?

A. Yes. When El Morro left, there was one-quarter on the passenger vessel—West Indies took.

Mr. Giallorenzi: You said passenger.

Mr. Lippman: I think you misspoke yourself. You said passenger when you meant freighter.

The Witness: Freightier.

Q. Go ahead.

A. One-half chamber on the passenger ship of Lebantino, Mr. Noboa has taken that space over. The space the Swanee Fruit and Steamship that Grayson held, Noboa has taken that over, also.

Q. Have there been any additional changes?

A. Not to my knowledge.

Mr. Dougherty: Whose one-half chamber did Noboa take?

The Witness: Lebantino.

Q. Then as I understand your testimony, Mr. Consolo, Mr. Noboa is at the present time sharing space on the passenger vessels with Messrs. Morey and Staff?

A. Yes.

Q. Mr. Consolo, do you require additional steamship space for the importation of your bananas from Ecuador to North Atlantic ports of the United States?

A. Yes.

[fol. 628] Q. Is additional space available to you on the Grace Line, Mr. Consolo?

A. No.

Q. Have you attempted to obtain refrigerated space on the Grancolombiana Line?

A. Yes.

* * * * *

Q. Mr. Consolo, you also testified that you would have been able to purchase an additional quantity of bananas in Ecuador?

A. Yes.

Q. At prevailing market prices?

A. Yes.

* * * * *

Q. What determines the market in Ecuador?

A. Generally the larger exporters—and it is common knowledge among all suppliers and growers and producers as to the price they pay, and generally the smaller importers such as myself just follow suit and pay the same price to the suppliers, producers, or growers.

Q. Would it have made any difference in the market in Ecuador—

Mr. Lippman: Strike that.

Q. Would an additional volume of exportations of 14,000 stems each week have had any effect upon the market in Ecuador?

A. No. It's an insignificant amount for the total amount shipped out of Ecuador.

* * * * *

Cross examination.

By Mr. Giallorenzi:

Q. Mr. Consolo, you testified that you have been engaged as an importer of bananas for the past fifteen years, is that correct?

A. Yes.

Q. You have imported these bananas from various areas in Central and South America, is that correct?

A. That's correct.

Q. Prior to the obtaining of space on the Grace Line vessels, which was in September of 1953—

A. Yes.

Q. (Continuing) —you imported these bananas into the Miami area, is that right?

A. Yes, sir.

Q. You make your home at 4425 North Michigan Avenue?

A. Yes.

Q. Or is that your business address, Mr. Consolo?

A. That's my home.

[fol. 629] Q. That is your home?

A. Yes.

Q. You have lived there during these past fifteen years, I take it?

A. Not at that particular address, but in the general area.

* * * * *

Vol. IV

November 11, 1958

Q. Did you discuss the ports of delivery and arrival?

A. We talked about Baltimore, Philadelphia, New York, and there was no sense of going into details, as to what port we were going into, unless we come to an agreement on price.

* * * * *

Q. Isn't it a fact that that is what you wanted, ships to go to Jacksonville?

A. I would take Jacksonville, yes, maybe seventh morning delivery.

Q. You would prefer Jacksonville where you have your organization?

A. Maybe I would have preferred Jacksonville, I would have taken Baltimore, Philadelphia, or New York on the proper days.

Q. Didn't you tell the Grancolombiana people that your preference was Jacksonville, because it was closer to your base of operations?

A. No, not a question of closer, a question of less days of arrival into the United States, Jacksonville.

Q. And arrival days are important?

A. They are.

Q. And again I say to you, before discussing price wasn't it of paramount importance to you to find out definitely from the management, how long it would take vessels to come to Baltimore, Philadelphia or New York, yes or no?

A. No.

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November 12, 1958

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Redirect examination.

By Mr. Kharasch:

* * * * *

Q. Mr. Giallorenzi asked you some questions concerning meeting of Grace Line shippers. Do you recall that discussion?

A. Yes.

[fol. 630] Q. I don't think he brought out what benefit was proposed—I don't know whether proposed is the right word, what benefit was there to be to the Grace Line shippers if the Standard Fruit obtained space on Grace Line ships.

A. Well, benefit that Grace Line shippers would have received if Standard had received space in Grace Line ships, providing that they would have stopped their Ecuadorian importations into New York City would have been, we believe, anyway, would have been better prices.

Mr. Giallorenzi: That is the Standard Fruit. The question is what benefit would the Grace Line have derived.

The Witness: All the Grace Line shippers would have received, if Standard Fruit took two chambers on the Grace Line, and three chambers, and stopped their importation of Ecuador fruit, ship to ship. There was 35,000, or 40,000 stems lost coming into New York. The Grace Line wouldn't increase, 35,000 or 40,000 stems less.

Q. In other words, it was stopped by this company?

A. Well, stopped.

Q. And would even lessen the supply of bananas coming into New York?

A. Yes, that is correct.

Q. As I understand your testimony, nothing ever came of this?

A. Not a thing.

Q. Other shippers on Grace Line gave up their space between October 1957, and October 1958?

A. Other shippers?

Q. Shippers other than you gave up space?

A. Oh, yes, they did.

Q. Did you ever give up any space?

A. No, I did not.

Q. How much space did you request from Grace Line on October 1957 when they were executing the new contract?

A. If my memory is correct, it was 50,000 cubic feet.

Q. Again, just so the record is clear, prior to October 1957 you had a weekly arrival on Grace Lines passenger vessels, and approximately bi-weekly for the nightly arrival on the freighter vessels?

A. That's correct.

[fol. 631] Q. In October 1957, even though Grace Line put you on more freighter vessels, so that the freighter service became weekly, nevertheless you were cut down to one arrival a week on the freighters?

A. That's correct.

Q. Did the Grace Line ever pay you at any time since 1955 an allowance of \$1,000.00 a sailing?

A. Since 1955?

Q. Yes, sir.

A. No.

Q. Did they lower the rate?

A. Lower the rate?

Q. Yes.

A. They did not.

.

Q. Have you imported bananas in several ports in the United States?

A. Yes, I have imported bananas in Miami, Tampa, Fort Everglades, Florida, New York, Baltimore, and I think in the strike period, a few into Charleston.

Q. How about Philadelphia, have you had a shipment to Philadelphia?

A. I think one shipment to Philadelphia, yes.

Q. The answer is yes?

A. Yes, one shipment to Philadelphia.

Q. Are you familiar with the banana market in the United States? Do you know first how business is done, and do you personally know many of the banana buyers?

A. Yes, I know many of the banana buyers.

Q. For how many years has the banana business been your principal business?

A. 13 or 14 years.

Q. With respect to Mr. Giallorenzi's attack on your financial ability, would you recall to me the figure which you said was necessary to finance the entire, or use of the entire refrigerated space on Grancolombiana Line, I believe it was?

A. South America, from South America?

Q. Doing business in the United States with a commission merchant?

A. In total he was trying to separate it.

Q. No, I want the total figure.

A. I would say about \$200,000.00.

Q. Would you require less, or more, or the same amount of money if you had just a portion of this space?

A. You would need less money, yes.

[fol. 632] Q. Would you require proportionately less?

A. It may be if you had less it wouldn't be exactly proportionately. It may be \$10,000.00, \$15,000.00 in excess to the proportion.

Q. Because of the necessity of setting up a separate organization?

A. That is it.

Q. Suppose now, Mr. Consolo, Grancolombiana Line had ordered you one-third of the refrigerator space.

Mr. Giallorenzi: I object here. This is purely hypothetical. Why pick one-third?

Mr. Kharasch: That is the figure we pick as a fair and reasonable allocation.

Examiner Robinson: Might have some hypothetical significance on both sides. I wouldn't worry too much about that.

Mr. Giallorenzi: Mr. Dougherty advises me that you threw out the last hypothetical question on this very point.

Examiner Robinson: That was beyond hypothetical; that had no foundation at all.

Mr. Kharasch: I will give you a foundation for the one-third. There are two complainants. They are here.

Examiner Robinson: I am not worrying about that.

Q. How much extra capital would you have had to commit to the banana operation in order to ship bananas on one-third of Grancolombiana space?

A. I have to go back to find out how much deposit would be due to Grancolombiana for one-third.

Q. Taking the figures that you had which I see you have them in front of you again.

A. One-third of that would be 17,000; two shipments take a figure of 5,000 stems would be one-third, roughly two shipments of that would be—

Mr. Kharasch: Off the record.

Examiner Robinson: Off the record.

(Discussion off the record at this point)

Q. Mr. Consolo, just so we get the pending question in exact terms, I am asking in terms of your own operation [fol. 633] how much extra capital, extra money would be necessary to be committed to it to ship an additional 5,000 stems which Mr. Kurrus points out is the high side, to be perfectly safe.

A. About \$80,000.00.

Mr. Blackwell: About \$80,000.00?

The Witness: Yes.

Q. Have you at all times since November 1955 had available to you a line of credit from a United States bank in excess of \$80,000.00, let's say \$100,000.00?

A. Yes.

Q. Have you this morning made arrangements to obtain a written statement from a bank to that effect?

A. I have made two arrangements this morning.

Q. Let's take this one first.

A. I have made arrangements. Funds were available to me from 1955 from one bank in the amount of \$100,000.00.

Q. All right, sir. Now, with respect to the second, please go on and tell us what the second account is?

A. Second arrangement is a credit is being established for me in Miami as of presently of \$200,000.00.

* * * * *

Cross examination.

By Mr. Giallorenzi:

* * * * *

Q. You testified that the entire No. 4 upper tween deck which is used by you and your brother on the contract, I don't know who it is used by on the contract, did carry at least 6,000 stems?

A. Depending on the size of the stems.

Q. Pardon me?

A. Depending on the size of the stems, about 57 to 63, that's depending on the size of the stems. I think that's about the figure.

Q. On May 7, 1958 on the Santa—rather you conceded you furnished me with that document?

Mr. Kharasch: The document is a Dixon and Company cargo outturn sheet dated May 7, 1957.

Mr. Giallorenzi: This one here, Santa Rita. I would like to mark those for identification.

[fol. 634] Mr. Kharasch: Yes, they were furnished you.

Examiner Robinson: Which is which?

Mr. Kharasch: You prefer them separately?

Examiner Robinson: Makes it easier. First one will be No. 38 for identification which is that?

Mr. Giallorenzi: Santa Ines.

Examiner Robinson: What is it called?

Mr. Giallorenzi: Cargo Outturn Sheet.

Examiner Robinson: Second one will be marked Exhibit 39 for identification, Cargo Outturn Sheet dated August 13, 1958.

Mr. Kharasch: Mr. Giallorenzi, since you are offering them, I assume you would be getting extra copies of them, would you be kind enough to delete the names of purchasers in the United States?

Mr. Giallorenzi: Yes, I will. I don't believe Mr. Dixon would want that.

Q. Will you tell us, please, looking at Exhibits 39 and 39, the amount of banana stems which were carried on these two particular trips?

A. I think 6,500; that's on Exhibit 39.

Examiner Robinson: Exhibit 39 says 66, or 9 manifests, and this one over here says manifest is 4631. Exhibit 39, if I may correct that says 6609.

Q. Now, there is a difference, roughly, of about 1,979 stems during that period of time. Can you tell us why you shipped almost $33\frac{1}{3}\%$ less on those two shipments if bananas were so readily available?

A. Well, there could be many factors on that.

Q. Let's hear some.

A. I would have to refer to the Ecuadorian books in Ecuador. There may be a barge mistake. We have had occasions where barges missed up, and had not shipped in time from the area where it came from. We had an occasion where the barge sunk with fruit and didn't get to the ship. We have had occasions where the tugboat broke down, and then we resold the fruit. There are many things, and I couldn't tell by looking at this here, tell you why this ship had 4,631 stems, and this ship had 465 stems. It could [fol. 635] have been that the market the previous weeks to that may have been lower, and I gave him instructions just to get the best fruit. I don't care what the shipments cost. Our problem was losing \$1.50 a hundred here on bananas. It didn't make much difference to me whether I shipped 4,000 stems, or shipped 6,000 stems. My loss would be the same, so I actually can't tell by looking at these two shipments whether this was 6,500 stems on August 13th, and this was 4,631 on May 7th.

Q. You mean your loss would be greater if they shipped a greater amount rather than the same?

A. If the market is that much variation?

Q. Yes.

A. Yes, it could be. I will even go further. There has been shipments where it would have been cheaper for me not to ship any bananas, just pay the freight. I can't answer you by just looking at these two what the reason for it is.

Q. Let's take a look at the market at this particular time.

A. You have to go back 10 days.

Q. Take a look at the market on May 7, 1958. This is the price you received. What is the range on the greens as they call them, the price range?

A. Six and one-half, and six.

Q. All right, what is the price range on the greens on August 13th which incidentally is Exhibit 39. The other one was Exhibit 38.

A. About the same price.

Q. The same, so it couldn't be the market.

A. Just one second. Let me complete this. This wouldn't reflect the market. You have to get the shipment before this to get the market because this is 15 days later after loading. You have to get two weeks before this to get a true picture of the market. The market could have changed while this shipment was in transit. In other words, the two weeks before this shipment would give you the actual market price for me to determine.

Q. Let's take a look at two weeks before.

A. On April 15th.

Q. That was May what?

A. May 7th you are referring to. It would be around April 15th, or April 22nd, that week.

Mr. Giallorenzi: The market about April 17th, we better mark this for identification, 40.

[fol. 636] Examiner Robinson: Information on shipment and so forth is marked Exhibit 40 for identification.

Mr. Kharasch: Same understanding, Mr. Giallorenzi, on each.

Mr. Giallorenzi: This is the Santa Rita Outturn report which is dated April 17, 1958.

Examiner Robinson: Yes, that is Exhibit 40 for identification.

Q. Now, the market on that date ranged from what?

A. Four and one-half cents a pound for green fruit, green selects, and about three and one-half on ripens, and rejects.

Q. So you attributed the lesser amount to the market?

A. I wouldn't exactly attribute it to the lesser market. I may have wrote him a letter the market is weak here two weeks before, tell him to get a strict selection, don't ship perfect stems because at \$4.50 a hundred pounds I would lose more money than taking in the fruit. I would be losing less by shipping less bananas.

Q. Now what—

A. (Interrupting) Let me see what the average weight is, maybe I can justify it by an average weight. I haven't got an average weight here. Just checking, for example, I am going over it fast. I noticed on this shipment over here my average weight was 77 pounds.

Q. Right.

A. From this total here.

Q. That would be?

A. On April 17, 1958.

Q. Exhibit 40 for identification.

A. All right, now on this shipment over here, what probably may have happened—

Q. (Interrupting) which is Exhibit 38.

A. That would be two weeks later.

Q. May 7th.

A. That would be in transit from the time he gets my letter. I noticed I averaged 80 pounds on this, so it probably was due—I am not saying it was probably due to the bad market. I told him to make a strict selection, get the best fruit possible. I don't care what you ship. I will lose more money in the United States than if I ship the fruit; that probably could be.

Q. How many stems can a barge carry?

A. That varies with different barges.

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[fol. 638]

Vol. IX

Hearing Room 3535,
General Accounting Office,
Washington, D. C.
Thursday, November 20, 1958.

* * * * *

JACK FRIEDLANDER was called as a witness, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenzweig:

Q. Mr. Friedlander, what is your occupation?

A. I am the General Manager of the Ecuadorian Fruit Import Company.

* * * * *

Q. Now, what aspects of the banana business have you informed yourself about in the course of your employment?

A. The purchase of bananas in Ecuador, the selection for quality to be loaded aboard the ships, the transportation from the different areas to the ship, loading aboard the ship, transportation from the port of loading to Philadelphia and distribution and sales.

Q. And in learning and broadening your experience in the banana business have you had occasion to make visits to Ecuador which is the source of the bananas?

A. I have been in Ecuador, I think, thirty times. I was employed by Ecuadorian Fruit.

Q. And while you have been in Ecuador how many ships have you loaded there?

A. Well, I have loaded about, I would say, fifty or sixty of the Grancolombiana vessels, because on each of these trips I stayed for one week, and I can remember one occa-

sion when I stayed for five weeks, and maybe ten Grace Line vessels.

Q. Incidentally, how long has Panama Ecuador been on the Grace Line vessels?

A. Since the middle of October 1957. As a matter of fact, I was at the first loading.

* * * * *

[fol. 639] Q. Your company has been on the Grace Line vessels, has it not, since the Grace Line vessels were first made generally available to banana shippers?

A. Yes, I was at the first loading at Puna.

Q. And approximately what number of Grace Line loadings have you witnessed?

A. About ten.

Q. Since October 1957?

A. That is correct.

Q. Now, turning to out-turns on the arrival of vessels on the Atlantic Coast of the United States. How many of the outturns of Flota vessels have you witnessed since September of 1955?

A. Well, we have had about 164 loadings so far, and I have been at every one of them outside of the times I was in Ecuador. You subtract one from the other.

Examiner Robinson: Let's get our thinking straight. He said that there has been 160 loadings, and you have been present. You mean unloadings, don't you?

The Witness: Unloadings.

* * * * *

Examiner Robinson: What is the difference, if you know, between the width of the side port, that is, the opening itself, not the doors, on the Grace ships and the Flota vessels?

The Witness: The Grace side ports are, I would say, a minimum of two feet wider and higher. The Flota side ports are higher up from the waterline so that the angle of incline from the pontoon to the side port is much steeper.

* * * * *

Q. Now, then how many decks do the Flota vessels have as compared to the number of decks of the Grace Line vessels?

A. They have three decks, and No. 3 hold, upper tween deck, lower tween deck, and lower hold.

Q. And in your opinion, does the number of decks which are required to be loaded affect the difficulty of operation?

A. No question about it. That completely changes the problem.

Q. And does it make the problem a simpler one or a more difficult one?

A. It makes it very, very difficult to load the extra deck [fol. 640] because time is of the essence and there are still only the same two sideports to load an equal number of stems.

Q. Now, then the process in loading the Flota vessels is the same as loading the Grace Line vessels to the point at the pontoons come alongside the vessel; is that not correct?

A. To that point.

Mr. Kharasch: I don't think that was his earlier testimony, to keep the record straight. I thought you said the Flota vessels are 100 yards offshore at Puerto Bolivar and the Grace Line vessels are 20 miles down the stream.

The Witness: That is correct. Fruit comes mostly from different areas to Puna, and it is more close to Guayaquil than it is to Puerto Bolivar.

By Mr. Rosenzweig:

Q. But the starting point is the same and the pontoon is alongside the ship.

A. Port and starboard.

Q. Port and starboard. Now here they are unlike in the case of Grace where you use both port and starboard sideports?

A. We are the only loaders.

Q. You are the only loaders. Now, then the first step, I take it, is to rig the stage from the pontoon to the side port?

A. The first stage is to open the sideport, and then we have to send carpenters in to arrange the stanchions and bin boards because they are never arranged properly.

Examiner Robinson: The stanchions don't remain permanent?

The Witness: No, we remove them when we unload the fruit and Flota spreads them all over. They load general cargo in this hold on the way southbound.

Examiner Robinson: How about the Grace vessels, are the stanchions knocked out each time, too?

The Witness: They are knocked out, too, but the crew on the Grace vessels arrange the stanchions and bin boards before the loaders come on board. They do not do that in the case of the Flota vessels.

[fol. 641] By Mr. Rosenzweig:

Q. Now, then how does the angle of inclination of the stage from the pontoon to the port on the Flota vessels compare with the angle of inclination of the stage from the pontoon to the sideport of the Grace vessels?

A. Anyone would have no hesitancy to walk up or down the incline on the staging on the Grace vessels to the sideport, but almost every American that I have seen going out on the Flota loadings sort of hesitates and has to be given a helping hand to go either up or down the staging because the angle of inclination is so steep.

Q. Now, the sideport in the Flota vessels opens unto the upper tween or the top deck of the three decks; is that not correct?

A. That is correct.

Q. And in order to load the vessel what is the next step after your crew of men has come aboard the ship?

A. Our carpenters are to array the stanchions and bin boards. The riggers rig the staging from the pontoon to the sideport, and the staging, the double stages from port and starboard, from the upper tween deck to the lower tween deck, lower tween deck to the lower hold, before they do that, they have to take the plugs, hatch covers,

floor boards out and put them to one side on the upper tween deck and the lower tween deck. Then they are able to rig their stages.

Q. Now, will you state for the record what these plugs are?

A. These plugs are insulated members that fit between the beams that run port to starboard in the square of the hatch. There are exactly four sets of plugs in the square of the hatch, and there are three plugs in each section between each beam.

Q. So there are, if my multiplication is correct, a total of 12 plugs to be handled?

A. That is correct.

Q. Will you estimate the weight of each of the plugs?

A. Well, I have seen five or six or seven stevedores working in coordination to move one, not to lift it, just to drag it.

Q. Now, then the Grace Line has no such plugs?

A. The Grace Line has no such plugs. It has only the hatch covers and floor boards.

* * * * *

[fol. 642] Q. Now, then, Mr. Friedlander, directing your attention to Exhibit 69, will you please state for the record what the facts of the arrangement of this vessel disclosed by this picture, how the facts of the arrangement of the vessel as disclosed by this picture affect the problems of stowage of banana cargo?

A. As I explained to you before, we have to remove the plugs and the hatch covers and the floor boards, floor racks, from the lower tween deck and the upper tween deck and move them mostly forward of the square of the hatch because there is very little room aft of the square of the hatch to stow this gear. We can't stow this gear either to port or starboard of the square of the hatch because the men are coming in from the pontoons and the banana barges and going down the stages that we set up to go down from the upper tween deck into the lower tween deck and then into the lower hold. There are little notches in this photograph which indicates where the beams are. We don't take those out of position. Those are left in the square of the hatch

because we put our staging down in between the beams and load down on the stages. We have a very sharp incline, a much sharper incline on the Flota vessels on the stages from the lower tween deck, from the upper tween deck to the lower tween deck, and then down into the lower hold because of the difference in the height of the decks.

* * * * *

Q. Now, examining Exhibit 13 in evidence, Mr. Friedlander, what does that disclose to you or how does that arrangement of the vessel which is there portrayed affect the loading?

A. It will only admit—

Q. What will only admit?

A. The sideport as shown in this photograph will just about admit one stevedore coming in with a bunch of bananas and another one going down to get another bunch of bananas. The door is very narrow, much narrower than the Grace Line sideport. We tried to get these made larger when these ships were built, and Captain Sanchez said that the insurance company that approved the design of the ships wouldn't allow it.

* * * * *

Q. Now, then we were at the situation, Mr. Friedlander, [fol. 643] where assumedly there would be somewhere between six and ten shippers aboard the Flota vessels, and I asked you what in your opinion would be the effect upon the loading of the Flota vessels if those conditions prevailed.

A. I asked you friendly or unfriendly?

Q. I think Mr. Giallorenzi supplied the word, neutral.

A. Are you talking about just the loading operation now?

Q. That is right.

Mr. Kurrus: Do you mean friendly shippers or what?

The Witness: Yes.

Mr. Kurrus: Mr. Friedlander is reading something to get the answer to the question. Can we see what he is reading?

Examiner Robinson: No. Why don't you just hold your horses for a minute?

By Mr. Rosenzweig:

Q. Go ahead, Mr. Friedlander.

A. I think it would delay the loading between ten and fifteen hours at a minimum. It would depend on certain factors whether it would be ten hours or fifteen hours, or it might even conceivably take another twenty hours.

Q. So it would be your opinion then that the—

A. You are talking about six loaders now?

Q. Six loaders. It would be your opinion then that the time would, stated generally, perhaps be at least double, if not more than double?

A. That is correct.

Q. Now, will you please explain for the record what the conditions are which would bring about this increased period of time?

A. Well, as we start loading now we are loading from pontoons tied to the Grancolombiana port and starboard side ports. We enter into the lower hold a maximum number of stacker teams that we can utilize to take the stems away from the carriers. We also store fruit into four positions on the upper deck. This results in quite a rapid entry of fruit from the banana barges to the ship until we get into the area around the well and square of the hatch, because the area that has to be loaded first where you employ the maximum number of stackers is in the aft end of the ship [fol. 644] since the bulk of that fruit is ahead of the feed to the machine in the low position. As we start to complete bins in the lower hold, which surround this well position, and particularly the square of the hatch, we have to take our stages out of the aft portion of the square of the hatch to permit the stowage of fruit in this area.

Q. Now, at that point if presumably you had your one set of stages of your own descending into the lower hold and one other shipper—and this assumes, I emphasize, only one other shipper—had the other set of stages, what would happen when you came to the area of the hatch and it became necessary to remove one or the other set of stages so as to fill with bananas the area which that set of stages occupied?

A. You would have to have access, one shipper would have to have access to the same set of stages, or to the stage that was remaining.

Q. And that would then present the problem of the stevedores who were bringing the bananas aboard the vessels comingling the fruit?

A. One would have to suspend loading. You couldn't possibly comingling the fruit.

Q. You could not rely upon the stevedores to deposit the fruit on the side of the ship which was available to the owner of that fruit?

A. That is correct.

Q. Now, then if there were no common use of the one stage-set of stages that were left, what would be the necessary procedure?

A. The area in which the stages had been removed would—the fruit would have to be passed down into that area by hand from the lower tween deck to the square of the hatch into the lower deck.

Q. And the effect of that would be?

A. The passing down of the fruit would slow the loading time by ninety percent.

Q. Now, then these same consequences would follow, would they not, on the lower tween deck and the mid-deck?

A. You would have the same problem as you started to surround the well area of the tween deck and you started to go into the area to finish that area up. You would have the same problem with the stages.

Q. And meanwhile, of course, the upper deck would have [fol. 645] remained empty?

A. There would be no fruit in the upper deck because the shippers would not have the availability of their barges alongside of the side ports.

Q. And what of the problem of removing the stages altogether?

A. When we start to remove the stages that enter from the tween deck into the lower deck, we remove the stages that go from the upper deck into the tween deck. We just replace them, this set of stages, and this tween deck starts

to go unto the pontoon or out of the ship, and this takes its place, and when we get through with this set of stages in the lower deck, this set goes out into the pontoon, and this takes its place. When we take these stages out the entrance of fruit has to be stopped into all decks.

Q. Now, then how would the procedure of replacing the plugs and the floor boards, the hatch covers and the floor boards be affected by this?

A. Well, if there was one set of stages, and this loader was denied the use of these stages.

Q. Now, Mr. Friedlander, please bear in mind that you are pointing to the diagram which doesn't appear in the record.

A. Yes. If the stages that were rigged from the tween deck into the lower deck on the aft portion of the square of the hatch had been removed, and this shipper said, "These are my stages. You can't use them," and I was loading the aft portion of the ship or the starboard portion of the ship, I would then have to pass this fruit down to stackers by hand.

Q. And, of course, the more time that is consumed in the lower hold delays to that extent the replacement of the plugs between the tween deck or in the ceiling of the overhead of the lower deck, is that not so?

A. That is right. This movement would slow down at least ninety percent. That has been our experience. When you start to pass stems of fruit down, you slow the process down by ninety percent when the procedure is using the stages.

Q. Then, of course, there would be the same loss of time on the tween deck?

A. There would be the same loss of time in this area, because then this staging—

[fol. 646] Q. In this area, you are referring to the lower deck?

A. In the lower deck, the staging, and eventually in the forward part of the ship has to be removed in order to stow fruit in the area that this staging occupied, and this fruit

has to be passed down by hand whether there are one shipper or three shippers in this particular lower deck.

Q. Now, then, of course, what you have so far described has assumed the existence of two sets of stages?

A. That is correct.

Q. And unless there were common ownership of such stages or a common use of such stages, the problem would be aggravated, would it not, when a third shipper was introduced?

A. It would be even aggravated with two shippers if there wasn't common usage because instead of passing the stages out, as we do, they are in the tween deck portion of the ship. This stage in the tween deck would have to be removed. This shipper would have to take his staging out in the lower deck and get his staging in the tween deck would have to be put back again.

Q. And I take it that in addition to the problems which you have described and the loss of time which would necessarily result, there would then be the loss of all the time which is gained in your loading of the top deck?

A. Yes, not only the top deck, but as we start to crowd in here we use the stage in the forward part of the square of the hatch to load the aft part of the square of the hatch, and as this operation slows down we are starting to send teams of stackers into the tween deck to stow the wings of the tween deck, where the plugs and the hatch covers and floor boards are not occupying any space so that by the time we finish the aft portion of the lower deck we are then able to take part of the plugs and hatch covers and floor boards to cover this area to make more space available in the tween deck to stow fruit.

Q. So that there would be a loss of efficiency and an increase of time by the delay of operations on the tween deck as well?

A. Surely, because it is our fruit now on both sides of the vessel, and if the stevedore is carrying the fruit from either side to see that the men who are passing the fruit down aren't taking it fast enough, instead of passing it to these men, they just spread it down into the tween deck. The

[fol. 647] stackers are stowing the fruit in the tween deck. Of course, at this time the larger stems go into the top deck.

Q. Now, then would you please venture an estimate as to the additional time which would be involved in loading of Flota vessels if there were ten shippers?

Mr. Kurrus: I thought the last question was six to ten.

The Witness: I was only answering as to six shippers. I will have to change all my answers if there were ten.

By Mr. Rosenzweig:

Q. Have your answers been based upon six shippers?

A. Yes.

Q. Now, will you kindly assume there were ten shippers?

I am going to assume for facility that there are only three shippers in each deck. I assume four in this lower hold and three in each of the top other decks. Of course, this deck generally holds as much fruit or more than the other decks.

A. I would estimate it would take about fifty hours to load the vessels.

Q. I take it it would be in your judgment just a matter of confusion worse confounded?

A. It would be complete and total. I didn't want to use the same phrase, confusion. I would have to think of something worse than that.

Mr. Kurrus: Chaos?

The Witness: Worse than that.

Mr. Lippman: Disaster?

The Witness: Disaster would be a good word.

* * * * *

Q. Now, then, Mr. Friedlander, would you explain for the record why it is possible in your judgment for fruit to be carried aboard the Grace Line without the consequences which you have described would result from allocation of space of shippers aboard Flota vessels?

A. First of all, you only have the two decks on the Grace vessels, as I explained previously, which even in our particular hold on the Grace Line permits loading within 12 hours.

Q. That is with three shippers using the one hold?
 [fol. 648] A. That is correct. Of course, only roughly between ten and eleven thousand stems are loaded into that one hold versus approximately fifteen thousand stems loaded into the one hold of the Flota vessel, but the refrigeration system on the Grancolombiana vessels totals approximately fifty horsepower per deck, while the refrigeration systems on the Grace Line vessels total approximately 100 horsepower per deck, which is mathematically double.

Q. Then is it not a fact that both the time consumed in loading the Grace Line vessels by multiple shippers and the time required by the vessel to bring the temperature down to the level required for the safe carriage of the fruit are both well within the tolerances which you have described?

A. Also the ventilation system is well within the tolerances. On the Grace Line they force fresh air into the holds. On the Grancolombiana the air introduced into the holds is induced into the hold by the exhaust blower, which has a capacity of 20,000 cubic feet of air per hour, 20,000 c.f.m. per minute. Exhausting the air from the hold, the fresh air automatically displaces it.

Q. So the fresh air on the Flota vessels is induced fresh air?

A. Induced fresh air.

Q. Air which is induced to enter the hold by the partial evacuation of air from the hold, which results in the operation of the exhaust fans?

A. That is correct.

Q. Whereas the system on the Grace Line—

A. —is a forced fresh air in-take, with two 20,000 c.f.m. blowers, port and starboard, on each deck, which is double the capacity of the Flota vessels, plus the fact that the supply, the refrigerated air supply enters each deck from the aft bulkhead and the port and starboard bulkhead, and returns to the forward bulkhead, whereas the refrigerated air on the Flota vessels being either supplied from the port bulkhead or the starboard bulkhead and returned to the other bulkhead, depending upon which bulkhead you were using as supply.

Q. That is only from one to the other?

A. That is correct, plus the fact that we are using conventional stowage on the Grace Line vessels in some areas, two stems standing, in other areas two stems standing and one [fol. 649] horizontal, or one flat, whereas on the Flota vessels we are stowing three high in some areas and three high and a flat, which makes it more difficult for the refrigerated air to penetrate and the exhaust air to be exhausted.

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Q. Now, Mr. Friedlander, is it your testimony that economic carriage of bananas on the Flota vessels is feasible only when that space is used by one shipper?

A. And by only one shipper, only feasible under those circumstances because it is very difficult and requires the utmost of time and patience for even one shipper to start to successfully carry bananas on these vessels. It is a constant challenge.

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Vol. X

Friday, November 21, 1958

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JOSE J. BORRERO was recalled, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Borrero, you have been previously sworn in and you have testified that you are or have been the Acting General Manager of Transportadora Grancolombiana, LTDA., the General Agent in the United States of Flota Mercante Grancolombiana and that you are now the Executive Vice President of Grancolombiana, N. Y., Inc., which is the general agent in the United States and Canada for Flota Mercante; is that correct?

A. Yes; that is correct.

• • • • •

Q. Let us start in 1953. Would that be better for you?

A. I think so. I testified here the other day, I think in answer to Mr. Blackwell, about the agreement that Grancolombiana had had in bananas and I think I came from 1949 to 1953.

Q. That is correct.

A. You want me to start from that point where I left off the other day?

Q. Yes.

A. Well, in accordance with my recollection and some [fol. 650] records, the last shipper of bananas prior to the Colombian company was Haytian, through the company of Miami, who made three shipments and that ended in April, 1953. From that time on we don't have anybody shipping bananas for multiple reasons. The main reason was because nobody wanted the space and, nevertheless, whether they wanted the space or not, at that time we did not have in service from April, let's say,—April, 1953—to November, 1953, the five vessels which we had had for space for bananas, which was required in this particular service.

Q. How many ships did you have with reefer capacity during the period of time in this service?

A. I would say in 1953—We have to bear in mind that the Venezuelan—you can strike that and I will come back to that. Grancolombiana, in April of 1953, was composed or organized by three countries. Venezuela, Colombia and Ecuador. We were using in the service from New York to South America—

Q. Is that the west coast?

A. —namely, from New York to Guayaquil, because that was the end of the run, vessels of Venezuelan flag. Then Venezuela withdrew from Grancolombiana in October, but prior to that time they had started taking those vessels to services connected with Venezuela in anticipation of that separation. You see, they were already moving the vessels to have the vessels in position so that when the separation came about, which was in October, 1953, they already had their services individually organized. Then I would say at that time we only had three vessels, the Ciudad de Quito,

the Ciudad de Medellin and the Ciudad de Manizales. In August, 1953, the company received the Ciudad de Cali and in November, 1953, the Company received the Ciudad de Ibague. Then I would say by December, 1953, the Company had again five vessels in service suitable for transportation of refrigerated cargo.

Then one of the reasons why there were no people interested in utilizing those vessels for the transportation of bananas at that time—let us say from April, 1953 to November, 1953—was because we couldn't offer a vessel a week. You have heard that regularity is a main factor for [fol. 651] success. But then it came 1954, in which we had the five vessels that used to sail from New York every Friday, on a weekly basis, which does not mean that they would come back with the same regularity, on the same day, because this company allows certain margins, you see—certain allowances for adjustment.

Q. Will you describe those adjustments or margins?

A. I will say, Mr. Giallorenzi, that we have, you see, five vessels in that service. You have a frequency of seven days. That means that every vessel has 35 days to make his round and start again. I could say that if a vessel making that round did not encounter any port difficulty or any problem out of the normal that that vessel could be back in 25 days, could be back to the first port north of Hatteras, either Baltimore, Philadelphia or New York, and that will give us ten days, you see, as a margin for the next sailing. If the vessel is OK, she goes back in 25 days; if she has problems, she goes back in 35 days, or even if she could make the trip in 34 days, still you can push the vessel and work overtime and try to sail the vessel on the schedule.

* * * * *

Q. Would that occur on many sailings, Mr. Borrero?

A. * * * That is one of the reasons there was no people interested in the space for bananas, the lack of regularity in arrivals here in the States. The whole year 1954 passed by without Grancolombiana carrying a single shipment of bananas. There were prospective parties that either called

on the telephone or wrote a letter or went to see us about this space. They made their criticisms and then walked away.

Q. Mr. Borrero, Mr. Friedlander testified yesterday that if a number of shippers were allowed to load bananas on Grancolombiana's vessels that it would increase the loading and unloading time considerably. I think he said the loading time might go as high as fifty hours and the unloading time would also be appreciably increased. What effect, if any, would that have on Grancolombiana's schedules?

A. Regardless of the word of Mr. Friedlander—he is [fol. 652] right when he says fifty, forty or thirty hours—any appreciable increase in the time that we allow now for this operation I think will cause problems in the fulfillment of the schedules because—especially in Philadelphia, on unloading, you have to stay there more than one day. I don't think we can take it.

Q. Now, Mr. Borrero, referring to Exhibit 15, pages 7 and 8, will you please tell us what is the maximum number of hours you allowed for loading bananas in Guayaquil?

A. In accordance with this contract, we allow them fifteen hours for loading of each vessel.

Q. Do you have the right to sail a vessel if loading is not completed within those fifteen hours?

A. We have the right, yes.

Q. You also have the right to charge them a penalty?

A. Yes.

Q. So that if there were multiple shippers and the loading time would be increased, you would have a right either to charge a hundred dollars per hour over fifteen hours or to sail the vessel directly regardless of how many stems had been loaded; is that correct, in accordance with your contract?

A. In accordance with this contract, yes.

Q. Now, how about unloading? Do you have a maximum number of hours in which they could unload?

A. Yes, sixteen hours.

Q. Where do you find that on Exhibit 15?

A. In the third paragraph.

Q. That is page 8?

A. Page 8, yes.

Q. And do you have the right to sail the vessel if they do not complete unloading within that period of time?

A. I think we have. I can read here and confirm my thinking.

Mr. Kharasch: I think we had some question about this contract earlier in the hearing and the ruling was that the contract was clear enough to speak for itself.

Mr. Kurrus: It's been speaking.

By Mr. Giallorenzi:

Q. I want to know now if—

A. Yes, it is in here.

“Should the Lessee not start full and normal unloading operations within the time assigned for this purpose or should same be commenced and not finished [fol. 653] within six hours after the expiration of the sixteen hour time allowed to lessee to effect the unloading of the bananas, Grancolombiana, at its sole discretion, shall have the right to sail the vessel from Philadelphia or other discharging point with the bananas on board.”

Q. With the bananas on board?

A. Yes.

Q. Now if the problem of unloading was increased by a number of shippers, as Mr. Friedlander testified, and the unloading time was greatly enlarged, would Grancolombiana sail the vessels with bananas on board?

A. Well, that is a hypothetical question because, you see, you may be able to stay or you may have to be forced to get out because you have to fulfill the schedules in other ports.

Q. And if you had a contract with a number of shippers, would you insist upon such a clause for loading and unloading?

A. We have to insist on a clause that puts a limit on and that limit has to be within our needs.

Q. And your needs are fifteen hours, I take it, for loading and sixteen hours for discharging?

A. Yes. We can't allow more time for this operation.

Q. And that is necessary so that you can insure the Friday sailing from New York?

A. That is correct.

Q. Incidentally, what part in the revenue of Grancolumbiana does the southbound cargo play? Is it an important part of your revenue?

A. In comparing the northbound and southbound movements, the southbound movement is greater.

Q. Revenue-wise and tonnagewise?

A. Yes.

Q. Is it necessary, then, on your southbound cargo movements to have a specific date for sailing?

A. Definitely. You are dealing here with hundreds of interested parties that require the preparation of documents and papers, the ordering of cargo to the docks and they need a regular, dependable service.

[fol. 654]

Vol. XI

Monday, November 24, 1958

JACK FRIEDLANDER resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross examination.

By Mr. Kharasch:

Q. Mr. Friedlander, as I understand it, you now have the title of general manager? Is that right?

A. That is correct.

Q. And general manager of what company, please?

A. General manager of the Ecuadorian Fruit Import Corporation.

Q. Would you please tell us what the business of the Ecuadorian Fruit Import Corporation is?

A. The business of Ecuadorian Fruit Import Corporation is to purchase bananas from Ecuador.

Does the Ecuadorian Fruit Import Corporation actually have an office in Ecuador for the purchase of fruit?

A. No, we do not have an office in Ecuador for the purchase of fruit. Since it is generally accepted good business practice to do business with a company that originates in Ecuador, we have a company in Ecuador— There is a company in Ecuador that we have established—

Q. What is the name of that company?

Examiner Robinson: Can you raise your voice?

The Witness: Exportadora de Productos Ecuatorianos, S. A.

By Mr. Kharasch:

Q. When you say "we have a company in Ecuador," whom do you mean by "we"?

A. I mean that I'm an employee of a company that is established in Ecuador by that name. I'm what they call "apoderado," which is the equivalent of the general manager in the United States.

Mr. Palitz: A-p-o-d-e-r-a-d-o. It means in English "power of attorney."

The Witness: I'm general manager.

* * * * *

[fol. 656] Q. And this contract was assigned to them by Messrs. Morey and Staff?

A. Was assigned to them Exportadora de Productos Ecuatorianos.

Q. Where did Exportadora—

Mr. Rosenzweig: If I may, I think at this point I'll make the observation that the contract, each contract—now, you referred to the present contract—that the present contract

will speak for itself as to the parties between whom it was concluded.

Mr. Kharasch: Yes, but I'm not clear on: Is that the first contract that gave Messrs. Morey and Staff the right to assign the contract to an Ecuadorian corporation to be formed? But I think Mr. Friedlander has just supplied the missing link. The Ecuadorian corporation apparently then assigned it to Panama Ecuador Shipping Corporation.

By Mr. Kharasch:

Q. Is that right?

A. That is correct.

Q. Now, Mr. Friedlander, will you look at Exhibit 71, which is a bill of lading, and would you look on the line where it says "Shipper"? The shipper is spoken of as Agricola San Vicente, S. A. Would you tell us who Agricola San Vicente is?

A. Agricola San Vicente is a corporation that exists in Guayaquil that buys fruit and loads the fruit on vessels and acts as the agent for Exportadora de Productos Ecuatorianos.

Examiner Robinson: Let's pinpoint just a little bit here at this stage. What would be your reaction to renting these stages if you thought it would help, assuming you had to share the space with someone else?

The Witness: I give you the particular problem in Puna where we load the Grace. The same pontoon that carries our staging equipment also carries the stevedores. So we take our stages out to the ship, we take them back to Guayaquil with the stevedores instead of waiting for Naboia to finish loading. But there wouldn't be any particular problem with the stages if the shippers wanted to cooperate.

Examiner Robinson: No, my point is: I said let's localize it. What would be your reaction? Would you mind doing it? Would you have any objection—

[fol. 657] The Witness: I would have objection to doing it with certain shippers, Mr. Robinson.

Examiner Robinson: Only with certain shippers?

The Witness: Yes.

Examiner Robinson: I'm not asking you which ones. I'm not interested in that.

The Witness: Yes. I wouldn't want to share with certain shippers.

By Mr. Blackwell:

Q. May I follow that up? Why?

A. There are personalities involved.

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Vol. XIII

Monday, December 1, 1958

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Cross examination (Resumed).

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By Mr. Blackwell:

Q. And the loading of the vessel in the aggregate, Mr. Friedlander, how much additional time did you say it would take? Is it seven to 12 hours for three shippers?

A. That's correct, Mr. Blackwell.

Q. And is that assuming friendly or unfriendly shippers?

A. I'm assuming where they will use the same stages and use the same equipment, do everything but commingle their fruit in the same bins.

Examiner Robinson: Is this a good time for a break?

Mr. Blackwell: Yes, it is.

(Whereupon, a recess was taken.)

By Mr. Blackwell:

Q. Mr. Friedlander, one of the chief reasons, if I correctly interpret your testimony, for having just one shipper on the Grancolombiana vessels, one banana shipper that is, is that when one shipper is loading the entire hold and the

operation, the loading operation, at any particular stage starts to slow down, that shipper can divert some fruit to other portions of the ship at approximately the same loading rate in the area that's being loaded. Is that correct?

A. That's correct.

[fol. 658] Q. Now, assuming three shippers on the Grancolombiana vessels, to a large extent wouldn't that also be possible if three shippers were given space on the vessel? To some extent at least wouldn't it be possible for them to load bananas into other areas or other holds or levels of the ship when the loading started to slacken off in a particular area of the vessel?

A. To some extent, yes, Mr. Blackwell.

Q. That's all I have.

Examiner Robinson: Well, that would depend—now, let's carry it to extremes—that would depend, of course, wouldn't it—or would it? I don't know what the answer is—as to who owns the staging?

The Witness: Well, I'm assuming that everybody worked together with the same staging.

Examiner Robinson: The optimum—

The Witness: Optimum cooperation and good will.

Redirect examination.

By Mr. Rosenzweig:

Q. Would that do it to any considerable extent?

A. No, a slight extent.

Q. And isn't it a fact that so long as each shipper is to have his own side port to work you cannot at any one time have three shippers working aboard the vessel?

A. No, you could have two shippers working aboard the vessel at any one given time but never three.

Q. But never three?

A. That's correct.

Q. So that if the three hypothetical shippers were each to have one deck there could never then be under those circumstances a situation in which all of the decks were being worked at the same time?

A. It would be impossible.

Q. Now, would you ever consent to have your fruit brought in at the same time through the same side port as another shipper?

A. It's impossible. It just doesn't work.

Q. And, in fact, you have great difficulties with your stevedores even now when you have the whole run of the ship?

A. That is correct.

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[fol. 660] FRANK VISCONTI was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenzweig:

Q. Mr. Visconti, will you please tell us what is your occupation?

A. I am an engineer. I am presently president of Alex C. Patterson and Sons, in New York City. We are mechanical contractors and engineers.

* * * * *

Q. Now, Mr. Visconti, are you familiar with the Flota vessels?

A. Yes.

Q. How far back does your familiarity with these vessels go?

A. Well, they actually start with the first shipment of bananas from Guayaquil. I flew down to Ecuador and came back with the first ship in order to survey and analyze the feasibility of carrying bananas on a ship; and also to observe what possibly could have been done wrong, because the reputation at the time for the shipping company in carrying bananas was very poor.

* * * * *

Q. And does your familiarity extend to the new Flota vessels as well?

A. Yes, they did. Approximately six or seven months [fol. 661] ago I also flew to Ecuador and came back on the latest type of Flota ship, the TUNA, to observe the latest in equipment and schemes that were installed on the ship and to vary, if necessary, the operating instructions in accordance with the new type of ship.

Q. Now, you were engaged by Panama Ecuador to do this?

A. Yes, on a part-time basis.

Q. And did your employment on behalf of Panama Ecuador require you to attend the vessels on arrival?

A. Yes, I do. I attend almost every unloading in Philadelphia on the Flota ships; and I did attend when first the Grace Line's operation was started, the unloading there.

Q. And could you estimate how many unloadings of Flota vessels you have attended?

A. Exactly 107.

* * * * *

By Mr. Dougherty:

Q. If you know, were the Flota ships built as banana carriers or designed to be banana carriers?

A. I know they were designed to carry bananas, but whether they are banana carriers such as you would have on the latest United Fruit ships or the Grace Line ships, that is another question. They carry bananas but a limited amount; and more important than that, the personnel factor is very important.

I think the engineers on the Flota ships are very competent, but they in many cases have never had experience. We have to actually sit, like I do, before—if a new ship comes up, like the future CIUDAD DE GUAYAQUIL, a new ship coming up now and it will go South and pick up some bananas, the chief engineer has never carried bananas. He has some conception of refrigeration, but the application and instructing him how to do this, how to turn this damper, why, and give him a history of bananas

and their care, that has to be done. And then after the chief has done a number of these trips, he usually becomes pretty competent. But you always—it is important to check with him because if it wasn't important, I certainly wouldn't go down to Philadelphia.

Q. What I had in mind was I understand, for example, the United Fruit ships are built exclusively as banana carriers; that is, refrigerated ships designed exclusively for [fol. 662] carriage of bananas.

A. Yes. Gibbs and Cox.

Q. And the Grace Line's ships are designed exclusively as carriers of bananas, are they not?

A. I think—yes, I would say they are.

Q. But that is not true of the Flota ships?

Mr. Lippman: Well now, I am going to object to that question. I think he has answered the question.

Examiner Robinson: If he knows. But if he doesn't know, all he has to do is say so.

The Witness: I don't think so, that the Grancolombiana ships are designed as primarily banana carriers, because there are a number of physical characteristics in the vessel that should have been more considered. Like the opening of the side port; on the new ships, the TUNA, in the TUNA class, that opening is so small, when there is a mean high tide or a mean low tide in the Delaware in Philadelphia, you can't run through out of the conveyer. And I remember speaking to Mr. Friedlander when he went to Germany to try to incorporate as many features in these vessels that would be more applicable to carry bananas; one of the things we stressed was a larger side port. Of course we couldn't have that changed. The bin locations. The size of the hatches. The size of the plugs.

I doubt if any other banana carrier has to contend with those physical problems.

For instance, on the MANIZALES, which is the first ship I sailed and consequently got very interested in it, the plugs weighed 400 to 500 pounds. And those things had to be lifted off every time you go into the hold. That type of ship, that class of ship is very, very bad to check over while

in transit. This tremendous plug had to be lifted out by four or five men, and you had to sneak into the hold that way.

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[fol. 663]

Vol. XV

Thursday, December 4, 1958

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JOSE J. BORRERO was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross examination.

By Mr. Kharasch:

Q. Mr. Borrero, I think in your direct testimony, you made the statement that Grancolombiana did not want to see any appreciable delay in its sailings.

What did you mean when you used the word "appreciable," matter of days? Matter of hours?

A. I don't think that I said the word "appreciable." What I tried to convey was that any delay that may interfere with the fulfillment of our schedule would be something that the company couldn't entertain.

Q. Your round trip now takes approximately thirty-five days, is that right?

A. From sailing to sailing, forty-two days.

Q. Forty-two days?

A. From sailing to sailing.

Q. Is that the same for the new class of ships as for the IBAGUE? The IBAGUE has the same speed?

A. No.

Q. The IBAGUE is slower?

A. Yes.

Q. You will receive a new ship to replace the IBAGUE?

A. There is a new ship coming, yes.

Q. When is that arriving?

A. I think by sometime in January, beginning of February.

Q. That will be of some assistance in keeping your schedules, won't it?

A. The company will do its best.

Mr. Rosenzweig: You said the company is planning to put—

The Witness: Planning to put the GUAYAQUIL—that is the name of the new vessel—in place of the IBAGUE.

By Mr. Kharasch:

Q. And since that will be a faster ship, it will assist you in your schedule keeping, will it not?

A. No. This is not the purpose, because the IBAGUE is [fol. 664] keeping the schedule. These two vessels are the same class, you see, same itinerary.

Q. You will then have six ships, all of the same class with the same speed; whereas you now have five faster ships and one a little bit slower?

A. That's right.

Q. Would a delay of three hours be such a delay in a forty-two-day turnaround that the company could not handle it?

A. It may be.

Q. Would a delay of two hours be such a delay?

A. It may be.

Q. One hour?

A. It may be.

Q. Ten minutes?

A. You see, Mr. Kharasch, it all depends on the way you are taking, the method. One delay of one hour, you may lose the working time in the next port of call, because the Port of New York do not work twenty-four hours a day at the same rate. You have to order men in advance for the working operations.

Q. On the other hand, a delay of one, two, or three, or four hours may not have any significance at all, because the ship might be arriving at midnight at some port?

A. May be.

Q. And you might have the time until morning, is that right?

A. May be. A delay of one hour can make you lose passing of the Panama Canal. That means one day's delay of the vessel.

Q. I think you explained that since the itinerary was extended on the service we are speaking of to include Peru, you have more flexibility in adjusting your schedule by sometimes skipping a Peruvian port, is that right?

A. You may be able to, sometimes, depending on the amount of cargo that you carry for those ports that you may be able to take.

Q. And you use that device now to keep your ships on schedule?

A. I will say we use that device now, but that is something I mentioned, something that exceeds that possibility. Of course, it is not a good practice to do so, because you have the traffic, you have the trade.

* * * * *

By Mr. Kurrus:

Q. Why did you publish this advertisement in 1955 offering your refrigerated space for the carriage of bananas from Ecuador? Do you recall?

A. Yes—

Q. In June of 1955, that is Exhibit 7.

A. Well, I think that I said in here that there was a time when we have put two of these refrigerated vessels to carry fish in the West Coast service, Vancouver-San Francisco; and that later when there was what we consider a firm prospectus, people interested in the space, the company decided to let know that we were interested in offering contracting the space if anybody was interested in it.

Q. Were you part of the discussions that entered into the decision to publish this newspaper notice?

A. I don't recall part of the discussion, because at that time I was not manager of Grancolombiana; I was operating manager, you see.

Q. In the United States?

A. Yes, here in the United States.

Q. Was this advertisement drafted after the advice of counsel?

A. I think so.

Q. Do you recall whether at that time you had considered the decision of the Federal Maritime Board in the case of Mr. Consolo against the Grace Line?

A. Well, as I said before, I was not in the discussion, where to put the advertisement or not to put the advertisement, you see. I know the advertisement was put by the company, that I know.

Q. And it was put in after the advice of counsel?

A. I think so.

Q. Why didn't you publish the same type of a notice when the initial contract to Messrs. Morey and Staff—

A. Maybe we considered it not necessary. The fact the advertisement was not put in that date in which you are indicating, I don't know why it wasn't put.

Mr. Dougherty: Your answer is that you don't know?

The Witness: I mean we didn't put the advertisement, you see.

By Mr. Kurrus:

Q. Do you recall whether there was any discussion whether you would put the advertisement in the paper?

A. No, I don't.

Mr. Dougherty: Now, there, is your answer that you don't recall?

[fol. 666] The Witness: What?

Mr. Dougherty: Is your answer there that you don't recall?

The Witness: I don't think so, there was any discussion; I don't recall any.

I mean at this very moment, I don't know why it wasn't put or why it was put.

By Mr. Kurrus:

Q. Do you consider the Grancolombiana Line offers a good and regular service in this trade at the present time?

A. Yes, I have to.

Q. It is true, isn't it, that this service has improved greatly since 1955?

A. Insofar as keeping the schedule?

Q. Insofar as your regularity, frequency, and your operating ability is concerned.

A. It has always been improving, but I would say the greatest improvement has been lately, you see, in that we have been able to put there the larger vessel and the faster vessel.

Q. Would you say that your service with respect to the carriage of bananas has undergone a substantial improvement since 1955?

A. In the latest week, yes.

Q. Excuse me?

A. In the last week or latest weeks, two months maybe.

Q. Would you say it has improved since 1955?

A. No. I mean—just a minute, has improved, of course, in comparison with 1955, but that doesn't mean in 1955, June, or end of 1955, there was an improvement. See, the improvement has been lately in these last months.

Q. But there has been a constant improvement over the period?

A. Well, the improvement came in when we have better tonnage, better vessels, you see. These—

Q. I see.

A. These vessels have come gradually, not at the same time, the five vessels, you see. They change—one in 1957 it was, and then three months later another, and so forth.

Q. Has your service between 1955 to date, for the carriage of bananas this is, been substantially better than whatever service you had for the carriage of bananas, let's say, in 1953?

A. Well, in 1953, we didn't have—we didn't have—I have [fol. 667] some dates in here, you see. It is difficult from memory.

Q. You can consult anything you want.

A. In 1953, we didn't have I think the whole five vessels there.

Q. Let me refresh your memory. You recall that you carried bananas one time for a company, Fruiterus Food Americana?

A. I don't remember that company.

Q. Do you recall your company carried bananas for Standard Fruit Company?

A. Luis Neboa, yes, the name of the man was.

Q. But they were shipped for Standard Fruit Company?

A. I think so, yes.

Q. You recall you had certain difficulties at that time with respect to the carriage of bananas?

A. I think I can answer you the question this way, Mr. Kurrus, we only have two vessels, only one vessel; I mean the shipment was every fifteen days or every three weeks. Only in 1953, we were able to offer five vessels, I mean a weekly service northbound for this particular purpose.

Later on, in view of there were no takers for the vessels, the company sent two or three of these vessels to the West Coast in 1954—excuse me, 1954, we have the five vessels there. There were no takers for it. It was at the end of 1954 that the company sent the CIUDAD DE QUITO, CIUDAD DE CALI, and I think the other one was MANI- ZALES, to the West Coast. When the company made the agreement with Mr. Staff and Mr. Morey, the company brought the vessel back from the West Coast, so that we could have five vessels in the run.

This same service we were able to offer at that time was the same in 1955 or 1956; and only when we received the new vessel in 1957, we could start improving the service.

Q. You didn't have much banana service, prior to 1955 was it? It wasn't very reliable?

A. I think I mentioned here all the agreement we had at that time.

Q. What is the difference in speed between your new ships and your old ships?

A. About 3 knots? $2\frac{1}{2}$ or 3.

* * * * *

[fol. 668] Q. When you spoke to Mr. Tibbett in September of 1957, do you recall whether you told him that if the Board required you to be a common carrier that you would make an effort to accommodate more than one shipper?

A. No, I don't recall precisely those words or anything of that sort.

Q. Did you say nothing to that effect, do you recall?

A. No. When I approached Mr. Tibbett, it was to get from him a direction where to go, what to do.

Q. But did you indicate to Mr. Tibbett that you were prepared to go anywhere? In other words, if the Board said to you, "Mr. Grancolombiana, you are going to have to accommodate more than one shipper," did you tell Mr. Tibbett, "Well, at that time we will attempt to accommodate more than one shipper"?

A. I don't remember, Mr. Kurrus. It would be unfair for me to say yes or no. I don't remember.

Q. You don't remember?

A. I don't remember.

* * * * *

Q. No. Who decided to come down to the Board? I don't take Mr. Tibbett and single him out.

A. Why we decided to come to the Maritime Board with the problem?

Q. Who decided, your attorney or you?

A. I would say the management of Flota.

Q. I see. Did you come down with your attorney?

A. Yes, with Mr. Giallorenzi.

Q. Do you operate a service similar to Grace Line's?

A. Similar in what respect?

Q. Similar with respect to the carriage of northbound commodities. Would you say that your service is similar to Grace Line's service from the west coast of South America, other than the fact that they go down to Chile?

A. They have also passenger service, you see.

Q. But would you say that their freight service is similar to your service, that you operate in a similar way?

Examiner Robinson: Just in general.

A. Yes, I think so, yes.

[fol. 669] Q. Do they solicit coffee just like you do?

A. Yes. Very successfully, too.

Q. You are competitive with them in solicitations of coffee?

A. Yes.

Q. And they generally carry the same commodities north-bound from Colombia and Ecuador as you do?

A. Yes.

Q. They don't carry any additional commodities that you don't carry, and it is unlikely that you would carry commodities that they don't carry. Isn't that true?

A. They may, because they call farther south than we do.

Q. I understand that, but with respect to the operation from Colombia and Ecuador.

A. No, because the main commodity from Colombia is coffee.

Q. No, and I understand that there is also wood, cocoa, frozen shrimp, and some other stuff like that.

A. Yes.

* * * * *

By Mr. Rosenzweig:

* * * * *

Q. Now, when you stated that the service had improved, did you mean by that that the arrivals at the Port of Philadelphia were more regular than heretofore?

A. Right.

Q. You did not mean, did you, that the vessels were now making the transit from Guayaquil to Philadelphia in less time than heretofore, did you?

A. No.

Q. And in fact they do not?

A. What?

Q. In fact they do not make that transit in less time?

A. No.

Q. Through the vessels which are presently in service, with the exception of the IBAGUE, are faster than the vessels which were formerly in the service, you utilize that ex-

cess speed of the vessels to make a longer stay at Buena-ventura, do you not?

A. Right.

Q. So that the transit time from Guayaquil to Philadelphia is still 12 days for the most part?

A. Eleven days.

Q. Which is it, 11 or 12 days?

A. Eleven days, I think.

[fol. 670] Q. The contract permits you 12 days?

A. A maximum of 12 days.

Q. And the additional speed of the vessels is also utilized southbound to go to the Port of Ilo in Peru and other ports which formerly you were unable to service with the slower speed vessels?

A. Yes.

Q. So that from the viewpoint of the banana shipper the additional speed of the new vessels is not a significant factor?

A. No.

* * * * *

[fol. 671]

BEFORE THE FEDERAL MARITIME BOARD

Transcript of Proceedings (Excerpts)—May 9, 1960

Vol. XVI

Room 705

45 Broadway

New York, New York

* * * * *

MAX BOYARSKY resumed and testified further as follows:

Redirect examination.

By Mr. Kharasch:

* * * * *

Q. Mr. Boyarsky, would you take Exhibit 111 and put it in front of you?

A. Yes.

Q. Would you, column by column, indicate what assumptions if any you made as to the data appearing in each column?

A. I could generally describe what the procedure was and what assumptions I had to make. I think it would be easier to do that than column by column.

Q. All right, sir.

A. I was given certain documents, which were the loading sheets indicating the number of stems loaded and the price paid for the bananas in Ecuador, containing information showing who the bananas were bought from, ship's name, and when the ship sailed from Ecuador.

I was given what were described to me as out-turn sheets, indicating the number of stems which were out-turned or disposed of from the shipment which were previously—which I previously mentioned as a loading sheet; and I was given certain documents which were described as liquidation sheets, showing the monies received on liquidation from the sale of these bananas.

I used the assumption that these were documents which were valid documents, and I used these documents in compiling my summaries.

I did not, as I indicated to Mr. Giallorenzi, I did not, in any way, attempt to confirm the authenticity of the documents. I did not undertake other procedures which I would have undertaken if I were asked, for example, to conduct a complete certified public accountant's examination of the things.

[fol. 672] — There are certain accepted procedures that any accountant would use that, of course, would have to depend on the job he was performing and would depend on the circumstances surrounding the particular order.

As far as I was concerned, this was a job that, very simply stated, was to take certain documents, accept those documents for what they were, and from those documents make statistical summaries and present them. That is just what I did.

* * * * *

SHILLO ADIR was called as a witness, and having been previously duly sworn, was examined and testified as follows:

Examination.

By Mr. Kharasch:

* * * * *

Q. All right, sir.

Will you then look at this other file again, where we have out-turn sheets for Banana Distributors and liquidation sheets for banana distributors; would you look through those and state whether or not they were prepared by your company?

A. Yes, they were.

Some of these earlier ones were prepared by some others, which was a period of six months, which were commissioned agents for the Dover Banana; National Banana, Inc., I think, was doing business in March of 1959, came about through Banana Distributors and R. Dixon & Co. joining in the National Banana, sold the fruit for the clients they had at the period they joined them. That continued about until September of 1959.

* * * * *

Mr. Kharasch: Mr. Examiner, at this time I would like to move the admission of Exhibits 41, 42, 43, 44, marked for identification at the previous hearing, and Exhibits 107, 108, 109, 110, 111, 112, 113, and 114 for identification marked at this hearing; and I would like to inquire—I am not sure—I believe Exhibit 22, the Ecuadoran conversion rate was already received. Is that right, sir?
[fol. 673] Examiner Robinson: Yes.

Mr. Kharasch: I ask that these exhibits be received.

Mr. Giallorenzi: I object to any and all of the exhibits which have to do with computation of damages, on the grounds that they do not truly reflect what damages, if any, Mr. Consolo, the complainant, suffered.

They are based upon apparent sales made by other companies and not Mr. Consolo's himself. They are based on

so-called profits before stevedoring and freight on Grace Line vessels and then they attempt to convert it, to cover the Grancolombiana vessels.

There is absolutely no proof in my opinion that one-third of the damages as set forth in these exhibits are proper. It is merely a picture taken out of the air.

For those reasons, I strongly resist the introduction into evidence of all of those documents.

Examiner Robinson: You refer to these exhibits as to their weakness and not to their relevancy, so I will receive them, and you attack them any way you deem fit.

(The documents heretofore marked for identification as Exhibits Nos. 41, 42, 43, 44, 107, 108, 109, 110, 111, 112, 113 and 114, were received in evidence.)

* * * * *

LOUIS F. MEYER resumed and testified further as follows:

Direct examination.

By Mr. Lippman:

Q. Mr. Meyer, you have previously testified in this proceeding, I believe in November of 1958?

A. That is right.

Q. Do you recall, sir?

A. Yes.

[fol. 674] Q. And you testified at that time that your company, A. R. Dixon & Co., was acting as commission agent for the sale of the bananas imported by Mr. Consolo on the Grace Line, is that correct?

A. Correct.

Q. Now, did you hear the testimony of Mr. Adir a few moments ago with respect to an arrangement whereby a new company was formed?

A. Yes.

Q. And what was that company?

A. The National Banana Company.

Q. Now, prior to the organization of the National Banana Company, did A. R. Dixon & Co. continue to act as Mr. Consolo's agent?

A. That is right.

Q. From the period of November 1958 through March of 1959?

A. That is right.

Q. And then, in March of 1959, National Banana Distributors was organized?

A. That is right.

Q. Did the organization of National Banana Distributors affect in any way your job of selling Mr. Consolo's bananas?

A. No.

Q. Did you continue in that capacity up through September of 1959?

A. That is right.

Q. So that, during the period from October 1957, when A. R. Dixon & Co. first started to represent Mr. Consolo, through September of 1959, A. R. Dixon & Co. and National Banana Distributors sold all the bananas imported by Mr. Consolo on the Grace Line ships; is that correct, sir?

A. That is right.

Q. Now, did the organization of National Banana affect in any way your ability to sell Mr. Consolo's bananas?

Mr. Giallorenzi: I object to this.

Examiner Robinson: It is a direct question. I don't see why he can't ask it of him.

Mr. Giallorenzi: I don't see the relevancy of it. I think it is irrelevant.

Examiner Robinson: What do you have in mind?

Mr. Lippman: I just want, in the interest of continuity, Mr. Examiner,—

[fol. 675] Mr. Giallorenzi: I withdraw the objection.

A. No, it didn't interfere.

Q. Now, during the period of November 1958 up to September of 1959, could you have sold for Mr. Consolo's ac-

count up to an additional ten to twelve thousand stems each week?

A. Definitely.

Q. And at what prices could that amount of bananas have been sold?

Mr. Giallorenzi: I object to this. This is very, very speculative, what prices they would be sold at, because certainly 12,500 additional stems in the market might mean a downward trend in the prices. It depends upon what the other fruit companies were bringing in, what the conditions of the market itself was here, how many bananas were being exported by the other companies; and I don't think that Mr. Meyer, with all his experience in the banana business, is that good a witness.

Examiner Robinson: You may cross examine him in due time and try to bring out any weaknesses which you hope to find. There is nothing wrong with the inquiry.

Mr. Giallorenzi: How could he testify, at this late date, at what he could have sold it, Mr. Examiner?

Examiner Robinson: You may answer the question.

A. Repeat the question, please.

(The last question was read by the reporter.)

A. The current market prices prevailing at that time.

* * * * *

Q. Do you consider yourself in competition with United Fruit and Standard Fruit, in respect to these customers who do not buy from you regularly?

A. Yes.

* * * * *

Q. And did you, at times, sell to customers of Messrs. Morey and Staff.

Mr. Dougherty: I think the time has come when we have to object to this line of testimony.

[fol. 676] What is being attempted is an effort to repair deficiencies in Mr. Meyer's earlier testimony, under the guise of bringing the case up to date.

At the earlier hearing, Mr. Meyer testified explicitly that he was not in competition with Panama-Ecuador, which is the concern that has just been referred to. When the reparations feature was severed; if I remember the testimony correctly, we were told by counsel there was a possible witness from Banana Distributors only. A little bit more on the issue of reparations, one fragment that has not come along—and I don't think that leaves the way open for a complete recasting of the testimony in an effort to salvage the case.

Mr. Lippman: I object to Mr. Dougherty's characterization of what we are attempting to do. We are merely attempting to complete a record which had certain ambiguities in it, and I think it is proper for this witness, now that he is here and available, in bringing the record up to date, in speaking of the entire reparations period, to describe just what his relationship was during that period with other people doing the same thing that he was doing.

Mr. Dougherty: Mr. Examiner, he described that at the first meeting quite explicitly; and what has occurred in the meantime is that there has been a realization that his testimony would not support the claim.

What is being attempted now is to repair the testimony under the guise of bringing it up as a mere fragment, by redoing in its entirety the whole general subject that Mr. Meyer testified to, and that was elaborately covered in his cross examination in the first hearings.

Examiner Robinson: Mr. Dougherty, if you feel there is any inconsistency, on cross examination you can confront the witness with what his testimony was in the record and see what you can get out of that.

Mr. Dougherty: I think it goes a little bit more to the weight afforded to the testimony. It involves the witness impeaching himself under the sponsorship of counsel.

Mr. Lippman: If it will help counsel any to amend my question, to confine it to the post-hearing period, namely, the period from November 1958 up until September—

[fol. 677] Mr. Dougherty: I don't consider that as a satisfactory solution, Mr. Examiner.

Examiner Robinson: Go ahead. You do what you want to tear that down to the proper limits. I have no objection.

I don't believe, in administering a hearing, in standing too much on certain— "You said that and you can't say that as of a given time."

I am trying to get a record, and it is not personal when I say this—I am not too much concerned, so long as you are not hurt judicially.

Mr. Dougherty: I understand. We are being hurt.

Mr. Lippman: You understand, Mr. Examiner, we are getting some facts and I don't think it should be precluded in bringing everything out.

Mr. Giallorenzi: We are being seriously prejudiced by this ruling, Mr. Examiner.

Examiner Robinson: I don't see that.

Mr. Giallorenzi: We brought it up in our briefs which were filed with the Maritime Board and yourself in this matter, and they noted there was this deficiency in their proof, and here, they are trying to salvage it.

In fact, when I objected to the supplemental complaint being tacked on to this hearing, one of the reasons which I stressed was that they were using this additional hearing for an additional supplemental complaint as a guise to fill in the gaps which they, themselves, have shown in their case.

The reply that I got to that statement which I made was for me to elaborate on it.

But this is the very proof of what I tried to bring out several months ago, that this supplemental complaint was nothing other than a device to get this evidence in, which they are doing this very day. And I would have been very, very happy to start an entirely new proceeding on the supplemental complaint alone, but they chose to do it this way, and I knew this was going to happen. Mr. Dougherty [fol. 678] knew it was going to happen. And that is why I vigorously oppose the supplementary complaint at this time, because I knew they were going to get their foot in, to salvage this case.

This is not unimportant testimony. If it were, I would agree with you readily that in an administrative proceeding of this type, we should have all the testimony in.

It goes to the very heart of the defense of our case and to allow this is very, very damaging and prejudicial to Grancolombiana, because there is specific testimony given by this gentleman at the prior hearing, and now he is directing, correcting, his own witness, and I don't think, whether it is an administrative hearing or a hearing before the Court, that they should be allowed to impeach their own witness.

Because, if this thing goes on, well then, the harm that could occur, not only in this case, but in every other case, is—I don't know how to express myself, but it would be tremendous, and I think that the time has come where we have to object vigorously to this attempt to repair their case.

And I may say that in that regard, we brought it out in our briefs and they saw it, they were educated to the lack of proof that they had.

Mr. Dougherty is responsible for that. He was the one that brought the point to my attention. And now they are trying to repair the damage which I believe cannot be repaired. We don't think that this testimony should be allowed to go in.

Just to show what an afterthought it is, let me read from Page 879:

"Examiner Robinson: How much would you have on your reparations, Mr. Kharasch?"

"Mr. Kharasch: Not very much more, Mr. Robinson."

"Examiner Robinson: What do you mean by 'not very much more'?"

"Mr. Kharasch: Very briefly. A witness, very briefly, and possibly some additional examination of someone from Banana Distributors, which was at one time Mr. Consolo's selling agent."

Mr. Kharasch, on Page 894, stated the following:

[fol. 679] "Mr. Examiner, at this point we have concluded our case on the issue of common carriage. We do have, as I said, a little bit more on the issue of reparations."

Mr. Kharasch again, on Page 834: "One more point on the record. You want to be clear that our evidence is in now on the reparations except for one fragment that has not come along. We are not forgoing our evidence in any way, we are just suggesting that the quick procedure . . ."

Now, I don't think that this is a fragment. I think this goes to the very heart of their evidence. I could see Mr. Boyarsky getting on the stand and bringing the computations up to date. That is understandable.

But bringing witnesses in to correct testimony they have given is certainly not a fragment. The record indicates that this is an afterthought. They gleaned it from our briefs. They said: "We will have to correct it." One of the ways they sought to correct it was under the guise of a supplemental complaint.

I objected to it because I knew we were going to have this type of testimony on this very day, and I am glad to see I have been borne out. After they read our brief and knew what their efficiency was, now they are trying to repair it by impeaching their witness.

I think it is improper.

Examiner Robinson: The objection is overruled. Will you ask the question again?

By Mr. Lippman:

Q. I will rephrase the question.

Mr. Giallorenzi: May we have a continuing objection to all this?

Examiner Robinson: You are protected. The rules provide for that.

Q. Mr. Meyer, confining your attention to the period subsequent to November 1953, did you have occasion, during the period of November 1958 up until September 1959,

to solicit and at times to sell to certain customers who purchased their bananas from Ecuadoran Fruit?

A. I sold to some of their so-called customers, yes.

[fol. 680] Q. And did some of your customers also have occasion to buy some of their requirements from Ecuadoran Fruit, to your knowledge?

A. I think so, yes.

SHILLO ADIR resumed and testified further as follows:

Direct examination.

By Mr. Kharasch:

Q. * * * Mr. Adir, does it also help in your banana sales to have more frequent arrivals?

A. Multiple arrivals in a period of a week are helpful.

Q. Why is that, sir?

A. Bananas have a ripening schedule and large jobbers, anyone who buys more than one load a week, would prefer to buy the second load and all additional loads on subsequent days, so he doesn't have to load his inventory at one time, which causes additional shipping damage, additional expense to him.

The more bananas you can give him spread over the week, the better it is for him.

It is easier to sell them.

Cross examination.

By Mr. Giallorenzi:

Q. And that leads me to a point where you testified earlier that the more sales you have, the stronger you are in the trade, and the better prices you can obtain. Isn't that correct?

A. Yes.

[fol. 691]

BEFORE THE FEDERAL MARITIME BOARD

ORAL ARGUMENT

Vol. I

Room 4519
GAO Building
Washington, D. C.

* * * * *

Transcript of Proceedings (Excerpts)—October 24, 1962

Chairman Stakem: Come to order, please.

The Federal Maritime Commission has scheduled at this time oral argument for reconsideration of reparation upon the existing record in Docket No. 827 (Sub. No. 1), *Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.*

Who appears for the Complainant?

Mr. Kharasch: Robert N. Kharasch, William J. Lippman and Amy Scupi, 1824 R Street, Northwest, Washington, D. C.

Chairman Stakem: Who appears for the respondent?

Mr. Boyer: J. Alton Boyer, of 529 Commonwealth Building.

Chairman Stakem: Time may be reserved for rebuttal. I might add that the Commission has been generous in the allocating of time and we have allotted forty five minutes to each side.

Mr. Kharasch, you may proceed.

* * * * *

Chairman Stakem: Mr. Kharasch, is your client still a shipper on Flota's vessels?

Mr. Kharasch: He was a shipper from 1959 to 1961—he is still a shipper on the Grace Line but he does not now ship by Flota, from 1961 on.

[fol. 692] Chairman Stakem: When did he first move on to Flota's vessels—you say it was 1959?

Mr. Kharasch: Nineteen fifty nine.

Chairman Stakem: September 1959 and when did he cease shipping via Flota—was that 1961?

Mr. Kharasch: Nineteen sixty one, September 1961.

Chairman Stakem: September 1961, thank you.

Mr. Kharasch: I am not just sure, Mr. Stakem, because the banana market, as the Board has found, in a previous decision, is a highly fluctuating market and it is outside the record—

Chairman Stakem: Nineteen sixty one is enough.

Mr. Kharasch: Nineteen sixty one was a hopeless year in which the Standard Fruit Company, for example, lost ten million dollars. Conditions, I understand, are somewhat better today.

Chairman Stakem: Have you made an effort, or has your client made an effort, to get back on the Flota ships since September of 1961?

Mr. Kharasch: I don't really know, Mr. Stakem. There was a dispute in September 1961 and there were arguments about what the state of the banana market was, and whether the rates were fair or not.

Chairman Stakem: I realize that some of these questions are outside the record, of course.

Mr. Kharasch: Yes.

Chairman Stakem: Thank you.

Mr. Kominers: I have the answer if you want it, sir.

Chairman Stakem: I am going to deduct about a minute of your time if you interrupt again.

Mr. Kominers: The point, sir, is that I was a party to these discussions and Mr. Boyer was not, and of course it is Mr. Boyer who is arguing this case on behalf of respondents today.

So, if you want the answer you would have to address the question to me although I am not arguing this case.

Chairman Stakem: Off the record.

[fol. 693] (Discussion off the record.)

Chairman Stakem: Back on the record.

Mr. Kharasch: The banana business, as I was saying, is a risky business. It is a business in which prices fluctuate wildly, in which the independent importer and even the very large company, experience large swings of profits in one sailing and enormous loss in another.

This is one reason why I think it is very important that a shipper who has been excluded during good times should receive reparations for the time he was excluded. If you do not allow a man to operate in good times, then he is going to find it awfully hard to operate in bad times.

* * * * *

[fol. 694]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Docket No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES
OF AMERICA, Respondents.

MOTION OF INTERVENOR PHILIP R. CONSOLO 1) TO DISMISS
THE PETITION FOR REVIEW FOR LACK OF JURISDICTION, OR
2) ALTERNATIVELY, TO REQUIRE PETITIONER TO FILE BOND
—July 7, 1961

Philip R. Consolo, intervenor in Docket No. 16,369 hereby moves 1) to dismiss the petition for review for lack of jurisdiction, or 2) alternatively to require petitioner to file a bond in the amount of \$175,000. A Memorandum in support of this Motion is attached.

Oral argument is requested.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy
Scupi, Galland, Kharasch & Calkins, 1413 K Street,
N.W., Washington 5, D.C., Attorneys for Inter-
venor, Philip R. Consolo.

[File endorsement omitted]

[fol. 695]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 16,369

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION OF INTERVENOR PHILIP R. CONSOLO 1) TO DISMISS THE PETITION FOR REVIEW FOR LACK OF JURISDICTION, OR 2) ALTERNATIVELY, TO REQUIRE PETITIONER TO FILE BOND

Philip R. Consolo (hereafter Consolo) has moved for leave to intervene in this proceeding as a matter of right, pursuant to 5 U.S.C. §1038.

I. THE PROCEDURAL BACKGROUND

Consolo is an independent importer of bananas from Ecuador into the United States. Flota Mercante Grancolombiana (hereafter, Flota) is a common carrier by water of freight in the foreign commerce of the United States in the trade from Ecuador to United States Atlantic Coast [fol. 696] ports. On November 15, 1957 Consolo filed a complaint, Docket No. 827, with the Federal Maritime Board ("the Board") alleging that Flota's refusal to allot him any refrigerated space suitable for the carriage of bananas violated the Shipping Act, sections 14 and 16 (46 U.S.C. 812, 815). The Board sustained the complaint and by Order dated June 22, 1959 directed Flota to apportion its space among all qualified shippers. Flota complied on September 1, 1959.¹ The complaint also asked that the Board order Flota to pay reparation to Consolo for his damages flowing from the illegal exclusion. During the hearing in Docket No. 827, the question of the amount of reparation due was deferred pending a determination on the merits.

¹ That order has been appealed to this Court in Docket No. 15,330 and briefs have been filed.

The Board's order of June 22, 1959 directed that further hearings be held on the claim for reparation.

At the reparation hearing, Consolo presented detailed proof of the availability of bananas in Ecuador, the week-by-week costs of purchasing bananas in Ecuador during the reparation period, and the week-by-week sales prices of bananas in the United States. This proof showed in detail that as a result of being excluded from shipping bananas on 195 Flota voyages during the period, Consolo was damaged [fol. 697] in the sum of \$589,398.87. The Recommended Decision of the hearing examiner would have restricted the reparation period to 105 voyages and awarded reparation of about half this sum (\$259,812.26), with interest to be added computed from the date of each sailing from which Consolo was excluded. The Board's decision of March 28, 1961, further restricted the period to 98 voyages, cut down the allocation of space upon which the amount of reparation was computed, and denied interest as an element of reparation, resulting in the award of \$143,370.98 which Flota now attacks in its petition for review.²

II. THE STATUTORY DILEMMA

Consolo is one of the four or five complainants ever to have received a favorable reparation order during the 45-year history of the Shipping Act, 1916. Consolo, understandably, wishes to collect. Flota, equally understandably, wishes to have the reparation order set aside by a reviewing court. It is plain that *some* court has power to order payment to Consolo, and that *some* court has power to review the reparation order. The question posed by this motion is: what court?

[fol. 698] We set forth below the relevant statutory provisions. Essentially, there are two distinct lines of statutory authority. The Shipping Act, 1916, in §30 (46 U.S.C.

² Consolo has filed a petition for review in this Court (No. 16,366) seeking review of the Board's order insofar as the order denies reparation for the full damages proved.

829) provides that in case of violation of any Board order for payment of money (as Flota has violated this reparation order), the person in whose favor such order was made may bring suit within a year in a district court, with the Board's findings and order *prima facie* evidence of the facts found. Under this provision no harm could come to Flota until Consolo files his complaint in a district court.³ When the complaint is filed, Flota can obtain from the district court (and upon appeal, from a court of appeals and the Supreme Court) a full review of the Board's order.

But Flota has not chosen to await filing of a complaint in a district court. Instead, Flota has sought review of the Board's order here, claiming jurisdiction under the Hobbs Act (5 U.S.C. 1031 ff.) Under the Hobbs Act, the courts of appeals review such orders of the Board as were formerly reviewable under §31 of the Shipping Act (46 U.S.C. 830). Thus, Flota relies on a second and distinct line of statutory authority to sustain its right to review in this court.

[fol. 699] Consolo recognizes that Flota is entitled to one review of the Board's order in one court. But the filing of Flota's petition in this court presents the painful prospect of two reviews. Thus, the court might proceed to assume jurisdiction, pass upon Flota's petition, and deny it. At this point, absent any arrangement guaranteeing Consolo collection under the reparation order, Consolo would have to commence a new suit, in a district court of another circuit, to collect on the order (and such suit will have to be begun within a year of the date of the Board's order). Still worse, in such a district court suit, Flota might seek to introduce new evidence, arguing that under §30 of the Shipping Act the Board's order is only *prima facie* evidence of the facts. Then, arguing changed facts, Flota might ask for a new construction of the law from the district court. In other words, Flota might try to obtain a double review of the Board's order, and this court's labor in reviewing the order upon the

³ Suit cannot be commenced in the District of Columbia. We have requested counsel for Flota to accept service of a complaint in the District of Columbia, and our request has been refused.

facts of record before the Board might become so much waste motion.

A construction of the statutes which provides a double review is obviously untenable. A review in this court which does not result in a final disposition of the controversy is, equally obviously, equally undesirable. Consolo, for his part, accepts any construction of the statutes which results in one lawsuit leading to one final disposition of the controversy.

[fol. 700] Accordingly, by this motion we move alternatively:

(1) To dismiss Flota's Petition for Review on the ground that this court lacks jurisdiction. If this motion is granted, Consolo will promptly file a complaint in a district court, and the controversy will be completely decided in that court (with a possible appeal).

(2) Alternatively, if this court determines that it has jurisdiction to review the Board's order, we move that Flota be required to file a bond guaranteeing payment to Consolo if the Board's order is sustained. In this manner, the entire controversy can be settled and concluded before this court.

In the usual course of events, the party against whom an agency awards reparation has simply awaited suit in a district court. See, e.g., *Hernandez v. Bernstein*, 2 U.S.M.C. 62, 31 F. Supp. 76 (D.C.N.Y. 1940), 116 F. 2d 849 (C.A. 2d 1941). We are aware of only one case in which the losing party sought review under the Hobbs Act. In *Coastwise Line v. United States*, Docket No. 16756 (9 Cir.), the losing party before the Maritime Board filed a petition for review in the Ninth Circuit, accompanied by a supersedeas bond in [fol. 701] the form attached to this motion as Appendix A. The bond permitted a reviewing court to dispose of the entire controversy once and for all.

An injured shipper seeking reparation under the Shipping Act has a long and difficult job at best, far longer than a complainant in a district court. He must prove his case

four times: (1) prevailing on the merits before an Examiner and (2) the Board, and then (3) proving his damages to the Examiner and (4) to the Board. Even with a reparation order in hand, a suit in district court (a fifth argument), with a subsequent (sixth) appeal, and a possible (seventh) review by the Supreme Court, may consume additional years. Review by a Court of Appeals bypasses one court and if a bond is available, can result in less delay. If, however, litigation in the Court of Appeals does not result in a final disposition of the controversy, the injured shipper's burden becomes not merely onerous, but almost insupportable.

All relevant facts bearing on this court's jurisdiction are now before this court. Only harm can come from any postponement of a decision on jurisdiction. If jurisdiction is absent, the injured shipper is entitled to begin his suit in district court at once. If jurisdiction is present, the offending carrier should be compelled to post a bond which will permit the controversy to be terminated quickly and cleanly. [fol. 702] Absent such a bond, the petition for review becomes not an instrument for justice, but a weapon for obtaining oppressive delay through inconclusive litigation.

III. THIS COURT HAS NO JURISDICTION TO REVIEW AN ORDER OF THE FEDERAL MARITIME BOARD AWARDING REPARATION

Flota asserts this court has jurisdiction to review the Board's order granting reparations under 5 U.S.C. §1031 et seq., 5 U.S.C. §1032 sets out the jurisdiction of courts of appeals. The applicable portion of that section reads:

"The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders . . . (c) such final orders of the United States Maritime Commission or the Federal Maritime Board of the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial re-

view pursuant to the provisions of section 830 of Title 46 [Shipping Act, §31] . . .”

Section 31 of the Shipping Act, 1916, says (46 U.S.C. §830):

“The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate [fol. 703] Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.”

The other provisions of the Shipping Act relating to enforcement of Board orders are §29 (46 U.S.C. §828):

“In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the Board determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.”

and §30 (46 U.S.C. §829):

“Violation of orders of Board for payment of money

In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States

having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

[fol. 704] All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement or an order for the payment of money shall be maintained unless filed within one year from the date of the order."

Thus, actions formerly brought under §31 of the Shipping Act before a three judge court—the forum for review of ICC orders—are now brought before a court of appeals under Section 2 of the Hobbs Act (5 U.S.C. §1032). Section 31, however, says that the venue and procedure in suits to review Board orders shall be the same as suits in regard to ICC orders *except* as otherwise provided. This exception must have reference to §30 of the Shipping Act (46 U.S.C. §829) which sets forth in considerable detail

the very special venue and procedure applicable to suits to enforce Board orders *for the payment of money*.⁴

[fol. 705] Thus, the Hobbs Act makes orders which were reviewable under §31 of the Shipping Act now reviewable in this court. An order awarding reparation is, however, *not* reviewable under §31 because that section exempts orders "otherwise provided" for, and orders awarding reparation *are* "otherwise provided" for under §30. This reading of the statutes makes sense when it is considered that if Flota can review here the Board order granting reparation, it might still claim a right to a second complete review.

The statutory scheme allows the person against whom a reparation order has been filed to obtain full review by simply not complying with the order; the complainant before the agency must then sue on the award in District Court.⁵ The defending carrier can contest the order on both [fol. 706] the law *and* the facts, because the statute provides that the Board order is "prima facie evidence of the facts therein stated." *Meeker v. Lehigh Valley R. Co.*, 236

⁴ Note that §30 of the Shipping Act does not apply to suits to review a Board denial of reparation. In *D. L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954) cert. denied 348 U.S. 839, the court held that §30 "applies only to actions to enforce reparations awarded by the Board" (210 F. 2d at 949), and review of a Board order *denying* reparations lies in the court of appeals.

⁵ cf. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (C.A. D.C., 1941), affirmed Per Curiam by an equally divided court 319 U.S. 732 (1943) and approved in *Union Pacific Railroad Company v. Price*, 360 U.S. 601, 612-16 (1959) where an employer sued for a declaratory judgment in court after his employee was successful before the National Railroad Adjustment Board. The court, holding there was no jurisdiction to entertain the suit, said:

" . . . unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such a suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board . . . The Act confers upon the employer the powerful advantage of defensive position in respect to the award. It places the burden of enforcement upon the employee . . ." (124 F. 2d at 246)

U.S. 412 (1915), quoted in *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663, 667 (C.C.A. 2, 1959) cert. denied 280 U.S. 555. Any errors of law committed in District Court are of course reviewable in the appropriate court of appeals.

If this court assumes jurisdiction to review the Board order awarding reparations, and sustains the order, Flota still may not pay, and Consolo would still be required to sue in some district court. A decision of this court sustaining the reparation order presumably would bar Flota from raising any legal defenses in the district court suit which had already been argued here. But if Flota attempted to contest the Board's findings of facts in the district court suit, as it might, the entire factual basis of this court's decision might shift. As a result, the review in this court (and a possible further review by the Supreme Court), would become so must waste motion.

Consideration of the statutory scheme for review prior to 1950, and the precedents, tends to show that the reparation orders described in §30 of the Shipping Act (46 [fol. 707] U.S.C. 829) were not included in the orders reviewable by three-judge courts under §31 (46 U.S.C. 830). Thus, suppose that prior to 1950 a party against whom a reparation award was made came to a three-judge court and sought to have the order set aside. Under the doctrine of *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949), the three-judge court would presumably have held that a single district judge, not the three-judge court, should pass on the validity of the award.⁶ Thus, a single district judge would be asked to declare that money was *not* owing before the successful party sued on the award—a fairly ludicrous situation.⁷

⁶ See *Shippers Car Supply Com. v. I.C.C.*, 160 F. Supp. 939, 942-43 (D.C. Ore., 1958).

⁷ "It is not thinkable that it should have been intended that a court of three judges should be convened, with direct appeal from their actions to the Supreme Court, to pass upon the validity of an order which amounts to no more than prime facie evidence." *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 852 (D.C. W. Va., 1930), *aff'd* 283 U.S. 804.

In *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850 (D.C. W. Va., 1930), aff'd 283 U.S. 804, plaintiff brought suit before a three-judge court to set aside certain parts of an ICC reparation order. The court dismissed the suit for lack of jurisdiction:

[fol. 708] "... even if the suit be considered as one brought to enjoin or set aside the order of the Commission, we are satisfied that the court has no jurisdiction to entertain it, for the reason that the order is a mere reparation order and is not one which may be enjoined or set aside under title 28, §41 (28), of the Code . . . And when we take into consideration the history of the Interstate Commerce Act and its amendments and the nature of reparation orders, we are certain that it was not intended that they be included among those which the court was given the power in a suit in equity before three judges to enjoin or set aside." ⁸

Under the Hobbs Act, the courts of appeal derived exclusive jurisdiction to review such orders of the Maritime Board as were "subject to judicial review pursuant to the provisions" of §31 of the Shipping Act (46 U.S.C. 830). Section 31 provides for the same review of Board orders as that provided for ICC orders, i.e., review before a three-judge court. Since I.C.C. orders awarding reparation are not reviewable by a three-judge court, the courts of appeal did not derive from the Hobbs Act jurisdiction to review orders granting reparation.

⁸ This case was approved in *Baltimore & O. R. Co. v. United States*, 87 F. 2d 605 (C.C.A. 3d, 1937). The dissent in *United States v. I.C.C.*, 337 U.S. 426 (1949) mistakenly cited this case as holding that the *shipper* cannot review the Commission's *refusal* to award reparation (337 U.S. at 453-54). The suit, as stated above, was brought by the *carrier* to set aside the Commission's *award* of reparations.

[fol. 709]

IV IF THIS COURT HAS JURISDICTION TO REVIEW THE BOARD'S ORDER AWARDING REPARATION, PETITIONER SHOULD BE REQUIRED TO FILE A BOND.

We have shown above that the statutes and the precedents support the conclusion that suits to review reparation orders of the Maritime Board are *not* covered by the Hobbs Act, and thus that this court lacks jurisdiction to pass on Flota's petition. It must be conceded, however, that the legislative history of the Hobbs Act reveals a definite Congressional purpose to provide a new, expeditious, and exclusive method of review of agency orders. Thus, in House Report 2122, 81st Cong. 2d sess., the Committee on the Judiciary said:

"At present the method of review of most of the judicially reviewable orders of the agencies involved in the proposed bills (the U.S. Maritime Commission, the Secretary of Agriculture, and the Federal Communications Commission) is prescribed by many provisions scattered throughout different statutes. These provisions have a common feature, that the controversy in relation to the orders complained of is heard and decided *de novo* in a district court. In cases in which the action is brought by the administrative agency the case may usually be heard by a single district judge. But in many types of cases, in which a party affected seeks to restrain or set aside the order of the administrative agency as illegal, the present law requires that it shall be heard in a district court with a panel of three judges, one of whom at least shall be a circuit judge and the others of whom may be district [fol. 710] judges. The pattern for this was established by the Urgent Deficiencies Act of 1913, and is continued by the present law (title 28, U.S.C. sec. 2284). In cases under this provision and others adopting the procedure, in which the trial in the district court is by three judges sitting *en banc*, there is a

right of review by appeal to the Supreme Court of the United States.

"The pending bill would substitute for the present mode of judicial review of the orders of the agencies to which it applies, a review by the appropriate circuit courts of appeals upon the record made before the administrative agency with further review on certiorari from the Supreme Court in its discretion, as in most other cases coming from the courts of appeals. This is the pattern established for review of orders of the Federal Trade Commission in 1914 (15 U.S.C. 45c) and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. It is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies.

"The proposed method of review has important advantages in simplicity and expedition over the present method. First, the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice. Under the Administrative Procedure Act of June 11, 1946, the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing on them, will be presented and the rights of the parties will be fully protected. The bill has adequate provisions in section 7 (b) and (c) for the taking of evidence either by the agency or in the district court, when for one reason or another that is necessary because a suitable hearing was not held prior to initiation of the proceeding in the court of appeals.

* * * * *

"The mode of judicial review provided in this bill [fol. 711] has been evolved from long study and care-

ful consideration by all persons concerned with the difficult questions involved. It represents an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal Courts.”

There is thus evidence of a plain intent to provide a new and improved mode of review avoiding the need to make a second record before a district court. Moreover, there is some evidence that Maritime Board reparation orders were specifically included within the coverage of the Hobbs Act. Reparation orders of the Board are issued under section 22 of the Shipping Act (46 U.S.C. 821) which allows the filing of complaints with the Board, calls for Board investigation of complaints, followed by orders, and also permits the Board to “direct the payment, on or before a day named, of full reparation to the complainant for the injury caused”⁹

[fol. 712] The then solicitor of the Maritime Commission, Mr. Page, told the House Committee on the Judiciary that “the act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the Shipping Act, 1916, and we feel . . . that

⁹ The full section reads:

Sec. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

the provisions of this act should apply to all reviewable orders of the Maritime Commission [now Maritime Board]"¹⁰ Following Mr. Page's statement, and exchange of correspondence with Judge Phillips,¹¹ the Hobbs Act was amended to its present form, granting to the courts of appeal jurisdiction over all orders reviewable under §31 of the Shipping Act (46 U.S.C. 830).

Thus, there is evidence of specific congressional intent to extend Hobbs Act review to a wide range of Maritime [fol. 713] Board orders, with the aim of utilizing the "more modern" and "best" method of review. This intent has been respected, and the second circuit has held that the Hobbs Act covers the Maritime Board's orders denying reparation: *D.L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

The specific questions remain, however, (1) whether the language of the statutes permits an interpretation allowing Hobbs Act review of orders *granting* reparation and (2) whether the intent of the Congress to provide a single, modern, expeditious method of review can be effectuated by providing a means for terminating the controversy in this court.

Any argument supporting review under the Hobbs Act must face at the outset that 5 U.S.C. 1032 begins by granting to the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" named orders. There is no explicit provision for *enforcement* of reparation orders.

¹⁰ Statement of Paul D. Page, Jr., Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress (1947) and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress (1949), at p. 137. Note that when Mr. Page refers to a "vast majority" of orders made under section 22 he means that most orders were made after hearings on complaints. He did not mean that a vast majority of orders required payment of reparation—for very few reparation orders have ever been entered by the Maritime Board.

¹¹ Hearings, *ibid.*, at pp. 145, 147, 149.

Nevertheless, 5 U.S.C. 1032 gives the courts of appeals jurisdiction to review such Maritime Board orders "as are now subject to judicial review under section 31 of the Shipping Act (46 U.S.C. 830)." Section 31 of the Shipping Act, in turn, speaks of "suit brought to enforce, suspend, or set [fol. 714] aside in whole or part," any order of the Board. Therefore, since all §31 powers are apparently transferred to the courts of appeals, the power to enforce reparation orders is arguably also transferred.¹² In short, if a court of appeals can "determine the validity" of a reparation order and determine that the order is valid, the valid order should be forthwith enforced by the court of appeals. It would be intolerable to contemplate a second complete review of the same controversy.

Assuming, then, that Flota's petition for review is properly before this court, there remains the practical problem of assuring that the entire controversy will be terminated here. The simplest and quickest way of assuring a quick and final end to the controversy is to require Flota to file a bond in this court in an amount sufficient to insure payment of the sum specified in the reparation order in the event this court upholds the order. Such a bond was filed in the only case we are aware of where Hobbs Act review was sought of a Maritime Board reparation order.

In *Aleutian Homes v. Coastwise Line*, 5 F.M.B. 602 (1959), the Board awarded a shipper \$17,000 reparation [fol. 715] against a carrier for unlawful overcharges. The carrier filed a petition for review in the ninth circuit, *Coastwise Line v. United States*, (C.A. 9, No. 16756), together with a supersedeas bond covering the amount of the reparation award. A copy of the bond filed is attached to this motion.

The necessity for a bond is plain. Absent a bond, the controversy cannot be terminated in this court. Further,

¹² If all §31 powers are not transferred to courts of appeals, there would remain some residual three-judge court jurisdiction—an incredible result. Cf. *Safe Harbor Water Power Corp. v. Federal Power Com'n*, 124 F. 2d 800, 804 (C.C.A. 3d, 1941), cert. denied 316 U.S. 663.

if it were not for the pendency of Flota's petition for review, Consolo could sue on his reparation award in a district court, and proceed to judgment, and the petition for review would then become moot.¹³

If Flota's petition for review is to be heard here, a district court suit on the reparation award clearly must be delayed. By filing its petition here, rather than awaiting suit in a district court, Flota has chosen this forum for review. All legal and factual issues can be tried here: legal arguments are of course available, and additional facts (if any) could be brought before this court by the machinery of 5 U.S.C. 1037 (c).

It is difficult to imagine what arguments Flota could use to oppose the filing of a bond. Surely, Flota cannot [fol. 716] claim the right to a second complete review in a district court. Equally surely, there can be no question that this court in its discretion can require a bond. While in the usual appeal a bond is required as condition of a stay¹⁴, here, although Flota has sought no stay, a bond is required if the review is to be final and effective. If Flota really wants this court to dispose of the controversy, it should file a bond. If, however, Flota is only seeking delay by imposing on this court a "preliminary" review, to be followed by an attempt at a retrial in district court, then Flota will not want to post a bond.

Clearly, Flota has no right to two reviews; equally clearly Flota is entitled to one review. If the one review is to be in this court a bond should be posted; if no bond is forthcoming Flota's petition should be dismissed.¹⁵

¹³ It would be perfectly appropriate, therefore, if Flota filed no bond, for this court to hold Flota's petition in suspense and permit Consolo to proceed to judgment in a district court.

¹⁴ See, e.g., *Beaumont S.L. & W. Ry. Co. v. United States*, 282 U.S. 74 (\$3,000,000 bond on stay of order enforcing division of rates); *Breswick & Co. v. United States*, 75 S. Ct. 912 (opinion of Mr. Justice Harlan requiring bond for plaintiffs' "greatest possible exposure to loss pending appeal").

¹⁵ Alternately, the petition could be held in suspense until the controversy is decided in district court.

[fol. 717] Oral argument is requested.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy
Scupi;

Galland, Kharasch & Calkins, 1413 K Street, N.W.,
Washington 5, D.C.,

Attorneys for Intervenor Philip R. Consolo.

[fol. 718] July 7, 1961

[fol. 719]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES OF AMERICA,
Respondents,

and

PHILIP R. CONSOLO, Intervenor.

REPLY OF RESPONDENTS TO INTERVENOR'S MOTION TO DISMISS
OR REQUIRE A BOND—Dated August 1, 1961 and filed
August 7, 1961

Intervenor, Philip R. Consolo (Consolo), has moved to
dismiss the petition for review for lack of jurisdiction or
alternatively to require petitioner to post a bond. Respon-
dents United States and Federal Maritime Board (the Gov-
ernment) take the position that this Court has jurisdiction

[File endorsement omitted]

and therefore oppose so much of the motion as requests dismissal. As to the request for the bond, the Government believes that this is a matter primarily between the private parties to this litigation and that it would be inappropriate for the Government to comment on it.

On March 28, 1961, the Federal Maritime Board (the Board) entered an order directing Flota Mercante Grancolombiana (Flota), a common carrier by water in foreign commerce, to pay to Consolo, a banana importer, the sum [fol. 720] of \$143,370.98 as reparations for injury caused by Flota's violation of Sections 14 and 16 of the Shipping Act, 1916, as amended (46 U.S.C. 812, 815). On May 23, 1961, Consolo filed with this Court (No. 16,366) a petition for review of that order requesting *inter alia* that this Court direct the Board to make a supplementary award of \$426,111.69 in addition to the award of \$143,370.98. On May 24, 1961, Flota filed with this Court (No. 16,369) its petition for review asking *inter alia* that this Court set aside the order making the award of \$143,370.98. The Board's order of March 28 is thus the subject of cross-petitions for review. Both Consolo and Flota are dissatisfied with the reparation award, Consolo because it is smaller than the amount he believes himself entitled to, Flota because it believes Consolo is not entitled to any award at all.

Consolo's motion to dismiss for lack of jurisdiction is addressed solely to Flota's petition to review (No. 16,369). Consolo's theory is that while an order *denying* reparations is subject to review exclusively in a court of appeals under § 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032), an order *granting* an award is subject to review solely in the district court under § 30 of the Shipping Act (46 U.S.C. 829). Thus, under Consolo's theory, the Board's order in the instant case, insofar as it denied Consolo the full amount claimed, is subject to review only in a court of appeals while insofar as it granted him a portion of the claimed amount is subject to review only in a district court. We believe that Consolo is mistaken and that the Board's

order in both its aspects is subject to this Court's jurisdiction.

[fol. 721] Flota's petition to have this Court determine the validity of and set aside the Board's order awarding Consolo reparations is based on Section 2 of the Judicial Review Act of 1950 (5 U.S.C. § 1032). That section provides that the several courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Board as were previously "subject to judicial review pursuant to the provisions of Section 31, Shipping Act, 1916 * * *."¹ Section 31 of the Shipping Act, 1916 (46 U.S.C. 830),² states that "except as otherwise provided" the procedure governing suits "to enforce, suspend, or set aside, in whole or in part, any order of the [Board]" shall [fol. 722] be the same as in similar suits "in regard to orders of the Interstate Commerce Commission * * *."³ The procedures for setting aside or modifying Interstate

¹ Section 2 of the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1032, provides in pertinent part as follows:

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

² Section 31 of the Shipping Act provides as follows:

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

³ The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), neither of which relates to suits to *set aside* Board orders. Section 29 provides for suits by the Attorney General to enjoin violations of Board orders. Section 30 provides for suits by private parties to enforce unsatisfied Board awards of reparations.

Commerce Commission orders by the district courts were established by the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220. Thus, Board orders which prior to 1950 were reviewable under the procedures established by the Urgent Deficiencies Act were transferred by the Judicial Review Act to the jurisdiction of the several courts of appeals. The issue here is whether an order granting reparations was an order thus reviewable.

The applicable review provision of the Urgent Deficiencies Act was incorporated in 28 U.S.C. (1946 ed.) § 41(28), the substance of which now appears in the Revised Code as 28 U.S.C. 1336 (See *United States v. Interstate Commerce Commission*, 337 U.S. 426, 432), and provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Prior to the Supreme Court's decision in *United States v. Interstate Commerce Commission*, 337 U.S. 426, it was thought that a reparation order, whether granting or denying reparations, was not an "order" subject to challenge under the Urgent Deficiencies Act. See the dissenting opinion [fol. 723] in *United States v. Interstate Commerce Commission*, *supra*. In that case, however, which involved a suit by the United States in its proprietary capacity as a shipper to set aside an order of the Commission denying it reparations, the Court squarely held that the reparation order issued by the Commission was "an 'order' subject to challenge under 28 U.S.C. (1946 ed.) § 41(28)," i.e., under the Urgent Deficiencies Act, 337 U.S. at 440-441.⁴ See also

⁴ The Court went on to hold that although the order was subject to review under the Urgent Deficiencies Act, a three-judge court, normally convened pursuant to that Act (see 28 U.S.C. 2325) would not be required to hear the case on remand. It so held because it concluded that a reparation order was not of the character which Congress had in mind when it provided the expedited appellate procedure which results from a hearing before a three-judge court. 337 U.S. at 442-443.

Pennsylvania Ry. v. United States, 363 U.S. 202, 205. This view has since been applied to a Maritime Board order. *Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839.

The pertinent legislative history of the Judicial Review Act of 1950 provides no basis for distinguishing between reparation orders and other types of orders. Indeed there is evidence, as Consolo himself concedes (Memorandum, p. 17), "that Maritime Board reparation orders were specifically included within the coverage of the [Judicial Review] Act." An earlier version of the Act, H.R. 2916, 81st Cong., 1st Sess., provided only that the several courts of appeals should have exclusive jurisdiction of "final orders of the [Board] entered under authority of sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended." All other orders of the Board were to "remain unaffected * * *." Hearings before Subcommittee 2 of the House Committee on the Judiciary on H.R. 2915 and H.R. 2916, 81st Cong., 1st Sess., p. 107. Spokesmen for the Board, while agreeing with the general purposes of the bill, recommended that H.R. 2916 be broadened. They stated (*id.*, p. 145):

* * * the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to all reviewable orders of the regulatory agencies involved * * *.

* * * As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, * * * and while the [Board] has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the [Board], it can be definitely stated that the largest number of important regulatory orders which the [Board] issues comes under section 22 of the Shipping Act, 1916. * * *

Section 22 of the Act (46 U.S.C. 821), it should be noted, is the complaint section of the Act pursuant to which Consolo instituted the administrative proceeding and is the

section which authorizes the Board to make reparation orders. In keeping with the views it disclosed to Congress, the Board offered an amendment providing for review in the courts of appeals of such final orders of the Board "as are subject to judicial review, pursuant to the provisions of section 31 of the Shipping Act, 1916 * * *." *Id.*, pp. 149-150. Explaining the proposed amendment, the Board's representatives stated (*id.*, p. 150):

[fol. 725] That provision [section 31 of the Shipping Act, 1916] is the one which brings the orders of the [Board] under the provisions of the Urgent Deficiencies Act.

This bill * * * makes those provisions applicable to reviewable orders under the Urgent Deficiencies Act.

The language ultimately adopted by Congress in the Judicial Review Act is virtually identical with that proposed by the Board. The legislative history thus fully confirms the intention of Congress to transfer to the court of appeals jurisdiction over all proceedings to modify or set aside final Board orders issued under the Shipping Act, including reparations orders issued under Section 22 of that Act.

The reparation order here in issue involves "the same parties, the same disputes, the same claims for money damages, and the same statutes." *United States v. Interstate Commerce Commission*, 337 U.S. 426, 443. Yet under Consolo's view, as we have already noted, Consolo may challenge the order insofar as it denied him the full amount claimed only in this Court but Flota may challenge the order insofar as it allowed Consolo any amount only in the district court. Such a view is hardly in keeping with the Congressional objective in passing the Judicial Review Act which was to make for "simplicity and expedition" in reviewing the orders of the Board and other designated agencies. H. Rep. 2122, 81st Cong., 2d Sess. 4.

The dictum in *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850 (N.D. W.Va.), *aff'd per curiam* 283 U.S. 804, cited by Consolo (Memorandum p. 14), that a

reparation order is not "any order" within 28 U.S.C. § 41 (28) (i.e., the Urgent Deficiencies Act) and therefore "is not one which may be enjoined or set aside under title 28, [fol. 726] §41(28)," flies squarely in the face of the contrary holding in *United States v. Interstate Commerce Commission*, 337 U.S. 426, discussed *supra*, and is no longer the law.

We agree with Consolo that Flota is entitled to but one review of the issues raised by its petition to review. But that is all Flota will get if the Board order in Consolo's favor is affirmed since, as was said in *In Re Federal Waters & Gas Corp.*, 188 F. 2d 100, 104 (C.A.D.C.), cert. denied sub nom. *Chenery Corp., et al. v. S.E.C., et al.*, 341 U.S. 953:

"When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of the reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become *res judicata*. [citations omitted]"

Respectfully submitted,

James L. Pimper, General Counsel;

Robert E. Mitchell, Assistant General Counsel, Division of Litigation;

Thomas D. Wilcox, Attorney, Federal Maritime Board.

Lee Loevinger, Assistant Attorney General, Antitrust Division;

Richard A. Solomon, Attorney;

Irwin A. Seibel, Attorney, Department of Justice.

Washington 25, D. C.

August 1, 1961

[fol. 727]

16,369

Note—Not part of record. Referred to in supplemental brief of respondents Flota Mercante Grancolombiana, S.A. in opposition (filed May 18, 1965).

[fol. 728]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,
Respondents,

PHILIP R. CONSOLO, Intervenor.

INTERVENOR'S REPLY TO ANSWERS TO MOTION TO DISMISS OR
REQUIRE BOND—Filed August 8, 1961*I. Scope of This Reply*

Four business days ago petitioner ("Flota") filed a 49 page Answer to Intervenor Consolo's Motion to Dismiss or Require Bond. In the brief time available before oral argument, it is not possible to prepare a reply discussing [fol. 729] in detail each of 56 cases cited by Flota, or each twist in the arguments Flota presents. In order to present our principal objections to Flota's arguments in a minimum space, this reply is devoted first to a statement in broad outline of the major considerations which refute Flota's arguments, and second, to a short commentary on the

[File endorsement omitted]

cases Flota cites. The Board's answer which avoids taking a position on most crucial issues, requires no further comment.

II. *Flota's Arguments*

[fol. 730] C. *The "Statutory Dilemma"*

At pages 23-28 of its answer Flota contemplates without pain the prospect that it will obtain two reviews. Flota sees no anomaly in a reading of the Hobbs Act which complicates, not simplifies the review procedure, and advances the proposition that double reviews are common, and favored by the law. The only comment required is an examination of the cases Flota cites, conducted below.

We repeat that for our part we are content with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews. The procedures of section 30 requiring suits in district courts are tortuous, and highly advantageous to the offending carrier. If the Hobbs Act can be read to allow Flota the option of having its review here, well and good. Flota's election to precipitate review here will speed up termination of the controversy. The issues can be settled here, and if the merits justify a finding that the Board's order was right and valid, the controversy should be at end, and Flota should pay its just debts.

[fol. 731] Flota, however, although reprinting the lengthy specification of errors of law and fact which appeared in its petition for review, claims (Answer, p. 27) that even if this Court finds the Board right on the law and the facts, another review is necessary in district court because "a whole range of other issues [all unspecified] is possible." Such a concept of the reviewing function is offensive. If Flota thinks there are "other issues" which are valid defenses, it should have presented them to this Court—or awaited review in the district court and not sought review here. Since review was sought here, the issues should be

openly, fairly, and finally litigated here—as Congress intended. There may be two roads to review, but a litigant must choose one.

D. *The Bond*

The last pages of Flota's answer (Answer, pp. 28-36) contend that this Court, having jurisdiction, should not adopt the procedural means to assure a final disposition of the case. Essentially the claim is that this Court lacks "enforcement" powers and that a bond would confer such powers. The conflict with previous Flota arguments is obvious.

Thus, Flota argues that this Court has jurisdiction (a) because the Hobbs Act transferred all section 31 powers to the courts of appeals and (b) because section 31 did [fol. 732] apply to reparation orders. Well and good, for if this is so, the section 31 powers "*to enforce, suspend or set aside*" are in this Court, and justice can be done between the parties. To do justice requires that a bond be filed, or, if Flota refuses, the dismissal or suspension of review proceedings awaiting disposition of a suit in district court.

III. *Flota's Cases*

Answer, page 10: Among the plethora of cases Flota cites there is *no* case under the Urgent Deficiencies Act, the Interstate Commerce Act, the Judicial Code, the Shipping Acts, or the Hobbs Act in which a carrier has obtained review of an order directing it to pay reparation *before* the order was sued upon.

It is true that in 1911 the Commerce Court decided, on the same day, four long-forgotten cases in which it held that the Commerce Court Act endowed it with jurisdiction of suits to set aside reparation orders. The jurisdictional points decided in these cases have never been relied upon or followed in the last fifty years. Instead, the reasoning of the Commerce Court was expressly disavowed in *Brady*

v. *I.C.C.*, 43 F.2d 847, affirmed 283 U.S. 804, and the court's [fol. 733] other holdings were universally ignored.⁴

* * * * *

[fol. 734]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,366

—
PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF
AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

—
PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL MARITIME BOARD

—
BRIEF FOR PETITIONER PHILIP R. CONSOLO—
December 8, 1961

* * * * *

[fol. 735]

Conclusion

Although the Board agreed that the carrier's behavior here was an inexcusable violation of the Shipping Act, the

⁴ For example, in one of these cases, *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Commerce Ct., 1911), the Commerce Court held it had jurisdiction to set aside an order denying reparation—yet the “negative order” doctrine was long in vogue in the district courts and in the Supreme Court under the Urgent Deficiencies Act. See *U.S. v. I.C.C.*, 337 U. S. 426.

Board trimmed the reparation claim in all possible ways. In three respects it cut away too much, and failed to award the full reparation which the law provides. With the detailed proof of damages present in the record, calculation of the additional reparation due is a matter of arithmetic. While the case might be returned to the Board to enter a supplementary award, all the facts necessary to a complete disposition of the entire controversy are now before this Court. Flota has chosen to bring its review of the award here, rather than awaiting a suit in District Court. Thus, the Court can enter an order terminating the entire controversy by requiring Flota to pay Consolo the amount awarded by the Board, plus (1) the reparation due for the period November 15, 1955-August 23, 1957, (2) the reparation due based on an allocation of one-third of Flota's refrigerated space to Consolo during the reparation period, and (3) interest on the reparation due for each sailing from which Consolo was excluded from the date of each sailing to the date of the award.

[fol. 736]

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy
Scupi, Galland, Kharasch, Calkins & Lippman,
1824 R Street, N.W., Washington 9, D. C., Attor-
neys for Philip R. Consolo.

December 8, 1961

[File endorsement omitted]

[fol. 737]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,366

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF
AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor,

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF
AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL MARITIME BOARD

REPLY BRIEF OF PHILIP R. CONSOLO, PETITIONER IN No.
16,366; AND BRIEF AS INTERVENOR IN No. 16,369—
December 8, 1961

• • • • •

[fol. 738]

Conclusion

The unquestionable facts and the relevant law require
(a) dismissal of Flota's petition to review in No. 16,369;
and (b) grant of Consolo's petition in No. 16,366. Flota

has chosen to seek review of the award in this Court. All the facts are before the Court, and the controversy is ripe for final disposition. Accordingly, the Court should enter an order terminating the controversy by requiring Flota to pay to Consolo the full reparation claimed in No. 16,366.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy Scupi, Galland, Kharasch, Calkins & Lippman,
1824 R Street, N.W., Washington 9, D. C., Attorneys for Philip R. Consolo.

December 8, 1961

[fol. 739]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC.,
Intervenors.

No. 16,366

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF
AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

[fol. 740]

On Petitions for Review of Orders of the Federal Maritime
Board, Now Federal Maritime Commission

OPINION—Decided April 26, 1962

Mr. J. Alton Boyer, with whom Mr. Odell Kominers was on the brief, for petitioners in No. 15,330 and No. 16,369 and for intervenor in No. 16,366. Mr. T. S. L. Perlman also entered an appearance for petitioner in No. 15,330.

Mr. Robert N. Kharasch, with whom Mr. William J. Lippman and Mrs. Amy Scupi were on the brief, for petitioner in No. 16,366.

Mr. Thomas D. Wilcox, Attorney, Federal Maritime Commission, with whom Messrs. James L. Pimper, General Counsel, Federal Maritime Commission, and Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, were on the brief, for respondents. Mr. Edward Aptaker, Assistant General Counsel, Division of Regulations, Federal Maritime Commission, at the time the brief was filed, was on the brief for respondents in No. 15,330. Mr. Irwin A. Seibel, Attorney, Department of Justice, was on the brief for respondents in No. 15,330, and also entered an appearance for respondent United States of America in No. 16,366 and No. 16,369. Mr. Richard A. Solomon, Attorney, Department of Justice, was on the brief for re-

[File endorsement omitted]

spondents in No. 16,366 and No. 16,369 and also entered an appearance for respondent United States of America in No. 15,330.

Mr. Robert N. Kharasch, with whom Mr. William J. Lippman was on the brief, for intervenor Philip R. Consolo in No. 15,330 and No. 16,369. Mr. George F. Galland also entered an appearance for intervenor Philip R. Consolo in No. 15,330 and No. 16,369.

Messrs. Richard W. Kurrus and James N. Jacobi were [fol. 741] on the brief for intervenor Banana Distributors, Inc., in No. 15,330.

Before WILBUR K. MILLER, Chief Judge, and BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, Circuit Judge: These cases raise issues concerning the grant of reparations by the Federal Maritime Board¹ to Philip R. Consolo, a banana shipper, against Flota Mercante Grancolombiana, S.A. ("Flota"), a steamship company, for Flota's allegedly discriminatory treatment of Consolo, who sought space on Flota's vessels for the shipment of bananas from Ecuador to the United States.

In our case No. 15,330, Flota challenges an order of the Board, dated June 22, 1959, in which the Board found Flota to be a common carrier of bananas between the United States and Ecuador, and to have discriminated against Consolo in the allocation of space, in violation of Sections 14 and 16 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 812, 815 (1958).² In No. 16,369, Flota challenges a later order of the Board, issued March 30, 1961,

¹ The Federal Maritime Board has recently been succeeded by the Federal Maritime Commission. See Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315. Most of the references in this opinion will be to the Board, but this should be considered as including the Commission, where appropriate.

² No. 15,330 was originally held in abeyance pending the outcome of *Grace Lines, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), a similar case.

directing Flota to pay Consolo some \$143,370.98 as reparations for the conduct condemned in the order of June 22, 1959. In No. 16,366, Consolo challenges the award of March 30, 1961, as inadequate.³

[fol. 742]

I.

We will take up first the issues presented in No. 15,330. The background of the controversy may be briefly stated. The Grace Line, another steamship company, offered a year-round regularly-scheduled weekly service to North Atlantic ports with vessels containing refrigerated ("reefer") cargo space suitable for carrying bananas. Flota offered a generally similar service. In a proceeding against the Grace Line, the Maritime Board ruled that under the Shipping Act that line was a common carrier, and must offer refrigerated space to all qualified banana shippers. *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615 (1959), aff'd sub nom. *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961); see also *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953). Since that ruling, Grace has carried bananas for a number of shippers. Flota, however, has carried bananas since 1950 under special contracts giving the contracting shippers the exclusive use of Flota's refrigerated facilities. In August 1957, following the Board's first decision in the *Grace* cases, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space. This was refused. On October 30, 1957, Flota filed a petition with the Board for a declaratory order determining whether or not Flota was required to cancel its existing contracts for banana shipment. On November 15, 1957, Consolo filed his complaint. *Banana Distributors*, a banana shipper similarly situated, filed its complaint thereafter. The three proceedings—the petition for a declaratory order and the two complaints—were consolidated for hearing.

³ Flota is petitioner in No. 16,369, as well as in No. 15,330, and intervenor in No. 16,366. Consolo is petitioner in No. 16,366, and intervenor in No. 15,330. *Banana Distributors*, an independent importer of bananas which is in substantially the same position as Consolo, is also an intervenor in No. 15,330.

[fol. 743] At an early stage, the Examiner ruled that he would defer the taking of evidence on the measure of reparation due the complainants until after the merits of the complaints were decided. The merits were determined in Consolo's favor by order of the Board dated June 22, 1959, and it is this order which Flota seeks to have reviewed in No. 15,330. At a proceeding commenced after the decision on the merits, evidence of damages was taken, and the Board entered a Report and Order on March 28, 1961, directing Flota to pay Consolo \$143,370.98 in reparations.

The threshold question in No. 15,330 is whether the Board could properly find, as it did, that Flota violated Section 14 Fourth and Section 16 First of the Shipping Act of 1916.⁴ Flota argues that the issue whether it had [fol. 744] violated these sections of the Act was not properly before the Board when the latter rendered its Report and Order of June 1959. The Board's Examiner had ruled, as we have seen, that the proceeding would be heard in two

⁴ Section 14 of the Shipping Act of 1916, 46 U.S.C. § 812, provides in part as follows:

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage"

Section 16 of the Act, 46 U.S.C. § 815, provides in part:

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

phases. In essence, Flota contends that the first phase was concerned only with the question whether or not Flota was a common carrier of bananas, and that all remaining issues, including the crucial question whether Flota was in violation of the Shipping Act, were reserved for the subsequent proceeding.⁵ As a corollary, Flota claims that in the first proceeding it was deprived of a proper hearing on the question of violation of the Act because it put on complete testimony only with respect to the common carrier issue.

The literal language used in making, and granting, the motion for a severance of the hearing can probably be read in such a way as to lend some support to Flota's contention. Thus, counsel for Banana Distributors, in moving to sever, said "we would like an immediate decision . . . on the question of whether or not the Grancolombiana Line is a common carrier" and "if the Grancolombiana Line is found not to be a common carrier, that would end the case." The Board explains this language by saying that the term "common carrier issue" was a kind of oral shorthand for the concept of violation of Flota's duties as a common carrier under the Shipping Act.

[fol. 745] Be that as it may, a careful reading of the record leads us to the conclusion that the only matter removed from the first proceeding was the question of the quantum of damages, not the issue of violation of the Shipping Act. Such in our view must or should have been the understanding of all parties, including Flota. In granting the motion to sever, the Examiner stated: "We ought to proceed with the merits." It is difficult to imagine the "merits" as excluding the issue of whether Flota had violated the Act. And in requesting separation, counsel for Banana Distributors spoke only of "our damage case" and "the dam-

⁵ Console argues that Flota is making this argument for the first time before this court. But in its Request for Oral Argument and Exceptions to the Examiner's recommendation, Flota said: "5—Flota excepts to the finding that it violated Sections 14 Fourth and 16 First of the Act on the further ground that such a finding was without the scope of the proceedings."

age part of this proceeding" as belonging in the second stage of the hearings. Moreover, counsel described the motion to sever as "a severance of the proceeding just like was done in the Grace Line case." It seems to us that the parties must have understood this as a reference to the closely similar and very recent *Grace* case, in which the common carrier and violation issues were treated together.⁶ Similarly, in two earlier Board cases which involved separated proceedings, only the question of the extent of the damages was left to the second hearings. See *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft*, 1 U.S.M.C. 686 (1937), 2 U.S.M.C. 62 (1939), aff'd, 116 F.2d 849 (2d Cir. 1941); *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131 (1949). [fol. 746] In moving for a severance, counsel for Banana Distributors clearly informed the Examiner and other counsel that his purpose was to "get on the Grancolombiana Line ships as promptly as possible." Given that purpose, it would have been pointless to restrict the case to the sole inquiry whether petitioner was a common carrier. For even if Flota were found to be a common carrier, this in itself would not get Consolo on Flota's boats if Flota's denial of space to Consolo was not an "unjust" or "unreasonable" discrimination.

Our conclusion that Flota should have known that the question of its violation of the Act was in issue is borne out by indications that Flota did in fact know this. In its own

⁶ Numerous statements by counsel for Flota throughout the proceedings unmistakably indicate that Flota understood "the Grace Line case" to be the 1959-60 litigation. Questions of statutory violation were treated in the first half of the Grace proceeding, and were reviewed—and the Board ultimately affirmed—by the Court of Appeals for the Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (1960), while the issue of the quantum of reparation had been deferred for further Board proceedings.

⁷ It may be noted that the Shipping Act itself, at Sections 29 and 30, recognizes a distinction between Board orders requiring the payment of money and other orders. See 46 U.S.C. §§ 828, 829 (1958); 46 C.F.R. § 201.251 (1958).

brief to the Examiner, Flota recognized that the legality of its conduct was in question. It argued that "denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors." It concluded its brief by arguing that its contracts "do not violate Section 16, First or Section 14, Fourth of the Shipping Act, 1916."

Finally, in its presentation of evidence and argument below, Flota went far beyond the "common carrier" question. It contended before the Examiner that even if it was a common carrier, it could not as a practical matter offer its refrigerated space on a non-discriminatory basis. It also argued that complainants had not shown that they were prejudiced or unjustly discriminated against because, according to petitioner, they had failed to show that they were competitors of Panama Ecuador, the favored shipper. Flota's presentation of its case in the first phase of the hearing is inconsistent with the position it now advances.* [fol. 747] We conclude that the Board properly had before it the issue whether Flota had violated the Shipping Act.

We turn to the Board's findings that Flota was a common carrier, and that it had violated Section 14 Fourth and Section 16 First of the Shipping Act. Flota argues that it was not a common carrier of bananas. But Flota as to most commodities is admittedly a common carrier by water,

* At no point in the first hearing was Flota prevented from putting on any evidence it desired relevant to the issue of violation of the Act. Not until its reply brief before this court did Flota seek to explain with any degree of specificity what facts it would have offered that it did not actually present in the first hearing. Flota argues that if it had known that the question of its violation of the Act was in issue in the first proceeding, it would have then put on certain evidence which it actually put on only in the reparations hearing. The evidence referred to in Flota's reply brief primarily goes to support Flota's contention that Consolo really did not need reefer space on Flota's vessels. This may be relevant to show mitigation of damages. But it would be of doubtful value in justifying Flota's discriminatory refusal to carry bananas for anyone other than the favored shipper. Flota has at no time suggested that it has any other evidence available.

and maintains a regularly scheduled and advertised cargo service between the west coast of South America and various ports in the United States. With the sole exception of bananas, which Flota regularly carries on the same vessels as other goods, Flota has carried cargo without discrimination, and without asserting a right to pick and choose among qualified shippers. But Flota charges the Board with error because the Board should have made "a finding as to petitioner's status in the carriage of bananas, without regard to its status in the carriage of other commodities not employing its reefer facilities." However, this precise argument was rejected in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960)—a decision with which we agree.⁹ Flota began its defense [fol. 748] before the Board by "assuming that the Grace Line decision [of the Board] is good, valid law, and we are not attacking that in any manner, shape or form." Flota sought to avoid the effect of the *Grace Line* cases by showing that Flota's operations and vessels were substantially different from those of the Grace Line. The Examiner and the Board took extensive evidence and considered this question at great length. The Board concluded: "The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. . . . Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable." 5 F.M.B. at 639. We believe this finding by the Board to be adequately supported by the record.

Finally, Flota contends that the Board did not consider the reasonableness of Flota's actions, did not make a finding with respect thereto, and could not on the record have

⁹ Judge Hand went even further than it is necessary for us to go in this case. He indicated that a company's "status in the carriage of other commodities" was not only relevant, but might be determinative. "[T]here is every reason of declared policy to assume that the term [common carrier] was used to include all those who were to some degree 'common carriers.'" 280 F.2d at 792. Cf. *Louisville & Nashville R. Co. v. United States*, 282 U.S. 740 (1931); *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 at 300.

found that Flota acted "unjustly" or "unreasonably." But the Board's report said in explicit terms "We find no justification for this conduct on the part of Flota" As we have pointed out, the Board rejected Flota's argument that structural differences between Flota's ships and Grace's justified Flota's discrimination. It also rejected Flota's attempted justification based on vessel scheduling and shipper convenience. It ordered that space be made available to shippers on a "fair and reasonable basis." It noted that an appropriate forward-booking system would be just and reasonable, "as opposed [fol. 749] to 'unjust' and 'unreasonable' which aptly describes the present system." Under the circumstances, we think it beyond question that the Board considered and made sufficient findings as to the reasonableness of Flota's conduct.

The Board's findings are supported by the record. Flota argues that it acted reasonably in refusing space to Consolo because Flota already had an exclusive contract with another shipper, Panama Ecuador, and because it sought to ascertain the legality of its conduct by petitioning the Board for a declaratory order. But the making and performance of the exclusive contract comprised the very conduct which constituted violation of the Act. Flota discriminated by favoring Panama Ecuador over Consolo—just as in the *Grace Line* case the carrier had made special contracts with favored shippers and had declined to serve others. Nor does Flota's action in petitioning for a declaratory order automatically excuse what would otherwise be a violation of the Act. Allowing the Board that measure of discretion due to it because of its expertise and status as an administrative agency, we think it was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just.

The Board's order of June 22, 1959, challenged in No. 15,330, will accordingly be affirmed.

II.

We turn now to the petitions in No. 16,366 and No. 16,369, dealing with the question of reparations.

Jurisdiction. Consolo has moved to dismiss Flota's petition in No. 16,369 for lack of jurisdiction, urging that this court cannot review orders awarding reparations, on petition of the party charged. Flota and the Board resist the motion, alleging that this court possesses jurisdiction to entertain the petition under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C. [fol. 750] § 1031 *et seq.* The Hobbs Act gives the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. § 830. Section 31 in turn provides that the venue and procedure in suits to enforce, suspend, or set aside any order of the Federal Maritime Board shall, "except as otherwise provided," be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The relevant statutory provisions regarding I.C.C. orders are contained in 28 U.S.C. §§ 1336, 2321-25. Section 1336 states:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Since Section 1336 gives the District Courts broad jurisdiction to "set aside" I.C.C. orders, and the procedure for Federal Maritime Board cases is similar by virtue of Section 31, the jurisdiction to set aside final orders of the Federal Maritime Board formerly possessed by the District Court under Section 31 of the Shipping Act appears to have been transferred to this court by the Hobbs Act.¹⁰

¹⁰ Sections 2321-25 of Title 28 of the Code (formerly contained in the Urgent Deficiencies Act), and a number of cases cited by

[fol. 751] Our jurisdiction to review No. 16,366, in which Consolo attacks the reparations granted as inadequate, was not challenged. We agree that the case is properly here. Cf. *D. L. Piazza Co. v. West Coast Line*, 210 F.2d 947 (2d Cir.), cert. denied, 348 U.S. 839 (1954). If we are obliged to review the order at the complainant's instance, it would be anomalous if we could not review it at the instance of the party it holds liable. Once here, the order should be reviewable in its entirety, and the rights of all parties considered. Cf. *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939).

We are well aware, however, that the jurisdictional problems in these cases are not free from doubt and difficulty. The Hobbs Act and Section 31 of the Shipping Act do not in terms purport to give us authority to render a money judgment based on a Board order awarding reparations, or to enforce any order of the Board. If a carrier chooses not to obey an order of the Board for payment of reparations, even after affirmance by this court, it may be that to obtain enforcement the complainant would be forced to go into the District Court in a suit under Section 30 of the Shipping Act, 46 U.S.C. § 829. The defendant in such a Section 30 suit would be free to demand a jury trial and to introduce evidence not previously before the Board. In the trial the order and findings of the Board would, by the terms of the statute, be given only prima

Consolo, such as *Brady v. Interstate Commerce Commission*, 43 F.2d 847, 852 (N.D. W.Va. 1930), *aff'd per curiam on other grounds*, 283 U.S. 804 (1931), deal largely with the procedural question whether a reparations order of the Interstate Commerce Commission is reviewable by a three-judge district court or a single judge court. Cf. *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949). Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders. We note, also, that Section 31 specifically refers to suits to "enforce, suspend, or set aside" Board orders; the Hobbs Act adds to this by including suits to determine the validity of such orders, but subtracts from it by omitting any reference to their enforcement.

facie effect. The ultimate result reached in the District Court might vary considerably from the Board's order.¹¹ [fol. 752] Conceivably, a jury might find the carrier to be free of any liability whatever. And any final judgment rendered could be appealed to the appropriate court of appeals, which might not be the same one which had reviewed the order in the first instance. A strong argument can be made that only one review should be permitted, and that we should not undertake to review the Board's reparations order at the present stage, in any respect. We have considered these difficulties in reaching our conclusion. But we think it clear that Congress intended, in the Hobbs Act, to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. 3 (1950); cf. *Pennsylvania R. Co. v. United States*, 363 U.S. 202 (1960); *D. L. Piazza Co. v. West Coast Line, Inc.*, *supra*. We think that Congress intended us to review reparations orders, at least to the extent necessary "to determine the validity" of such orders on appropriate petition, and that it is our duty to do so.

The scope of our review in Nos. 16,369 and 16,366 also presents difficulties. Questions of law, such as matters of jurisdiction and fair administrative procedure, are obviously for our determination. Cf. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547 (1912). But in reviewing the evidence, we are confined to a much more restricted standard, as the Administrative

¹¹ We do not, of course, wish to minimize the res judicata effect of our decision. See *In re Federal Water & Gas Corp.*, 188 F.2d 100 (3d Cir. 1951), *cert. denied sub nom. Chenery Corp. v. Securities and Exchange Commission*, 341 U.S. 953 (1951). Our determination of the issues dealt with in No. 15,330, for example—such as the issue as to whether or not Flota violated the Act—is undoubtedly binding on Flota and the other parties. Flota chose to come to this court—it cannot reject our decision.

Procedure Act, §§ 1 et seq., 5 U.S.C. §§ 1001 et seq. (1958), and a long line of Supreme Court decisions, clearly indicate. See, e.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *United States v. [fol. 753] Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942). We have examined the appeals from the reparations award with these considerations in mind.

The Merits. In No. 16,366, Consolo seeks additional reparations. He questions the Board's denial of pre-judgment interest. But the cases cited by Consolo, such as *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925), only demonstrate that recovery of interest is not barred, not that the granting of interest is mandatory. We find that the Board did not abuse its discretion in denying interest. Cf. *Dorsett v. Shore*, 254 F.2d 373, 377 (4th Cir. 1957); *Miller v. Robertson*, 266 U.S. 243 (1924); *Board of County Comm'rs of the County of Jackson v. United States*, 308 U.S. 343 (1939).¹² Consolo also claims reparations from the time he first demanded space. The Board calculated the reparations from the time Consolo first demanded an *allotment* of space. Prior to that time, he was unsuccessfully bidding for an exclusive patronage contract for Flota's entire reefer space. This is exactly the kind of exclusive contract which Consolo now claims was illegal and damaging to him. Under these circumstances, we think the Board was reasonable in declining to begin the reparations period at an earlier date than the time Consolo first attempted to secure a fair and equitable portion of space. Finally, Consolo, like Flota, is dissatisfied with the 18.46% of the total computed net profit awarded to Consolo. Flota says Consolo should only have received 15.58% since this is the only amount of space *it says* it would have given him. Consolo wants 33⅓%, arguing that there were only three qualified ship-

¹² For similar reasons, we reject Flota's argument that the Board's award of interest on "amounts unpaid after 60 days," from March 30, 1961, was erroneous.

pers during the reparation period, and hence he should have been allocated one-third of Flota's banana space. [fol. 754] Yet it hardly seems reasonable to say that all qualified shippers must be given equal space, regardless of the applicant's size, facilities, financial position, and ability to arrange for the loading and discharging of the cargo. The Board's selection of 18.46% was based on an allotment to and use by Consolo of that percentage of the cubic capacity of Flota's ships on the United States Atlantic run in actual practice over a period of time. Perhaps the Board might have chosen a better yardstick. Perhaps not. We are surely unable, however, to say that the Board's choice was arbitrary or unreasonable. We therefore find no merit in Consolo's petition in No. 16,366.

In No. 16,369, Flota seeks to avoid the payment of reparations primarily by arguing that it did not violate the Shipping Act. To the extent that a number of its contentions in this regard have already been dealt with in our consideration of No. 15,330, we will not repeat them here.

Flota makes a number of additional arguments.¹³ It first claims that there was no proof or finding of actual competition between Consolo and Panama Ecuador. But though the express words "we find competition existed" are not employed, the entire decision of the Board is implicit with the finding of such competition. For example, the Board repeatedly refers to the fact that "Panama Ecuador, in receiving and using that space [of Flota], was favored and advantaged." 5 F.M.B. 638-39. And the Board explicitly speaks of Flota denying space "to a qualified competitor." 5 F.M.B. 639. In context, the word

¹³ Flota also argued that the Board misconstrued its function vis-a-vis the Examiner. The statement of the Board upon which this connection is based has been taken out of context as quoted in Flota's brief. Neither other statements by the Board nor its actions will support Flota's claim in this regard. The argument that Consolo's claim for reparation was untimely is similarly without merit.

"competitor" clearly refers to Consolo, in relation to [fol. 755] Panama Ecuador.¹⁴ Moreover, granting to the Board the right to draw reasonable inferences, we believe that there is sufficient evidence in the record to support a finding of competition, especially since Consolo and Panama Ecuador were both dealing in exactly the same commodity at the same time, were both "independents," and both shipped extensively to many of the same seaports.

One of Flota's principal arguments, however, was and is that the Board erred in failing to hold that it would be inequitable to award reparations to Consolo. Flota marshaled substantial evidence in support of its contention. It pointed to the unsettled nature of the law in the field, as illustrated by the fact that the Second Circuit in the first *Grace Line* case reversed the Board's order and remanded it, concluding that the legal theory adopted by the Board was erroneous. 263 F.2d 709 at 711. In the second case (which was not decided until July 1960), the majority agreed with the Board's new approach to the case, but Judge Moore filed a strong dissent, 280 F.2d 790. At the hearing in this case, Flota advanced evidence of factual differences between its situation and that of the *Grace Line*. While this would not necessarily justify Flota's conduct, it might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable. Flota also complained, with some justification, of the two-year delay of the Board in rendering a declaratory order.¹⁵ Moreover, Flota already had signed

¹⁴ The Board also noted Flota's exception No. 16 to the Examiner's failure to make a finding of competition between Consolo and Panama Ecuador. The Board found that "the 16th exception is unsupported by the record."

¹⁵ Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit. See Administrative

[fol. 756] an exclusive contract with Panama Ecuador covering what may well have seemed to be, in the light of the Board's decision in the *Banana Distributors* cases, 5 F.M.B. 278 (1957), and 5 F.M.B. 615 (1959), a reasonable period of time. By granting space to Consolo and other shippers when first requested, Flota might have opened itself to possible liability for breach of the contract with Panama Ecuador, at least in the absence of a declaratory order from the Board. Finally, Flota pointed out the difficulties and delays in loading which would result if more than one shipper were to use Flota's refrigerated space, and Consolo's apparent failure to utilize all of the space available to him on Grace Line vessels. The Board took up most of these points individually and disposed of them briefly.¹⁶ But the essence of Flota's argument was that the cumulative weight of all the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider, in light of the Board's decision and the damages it imposed, that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant [fol. 757] reparations once it found a violation of the Act,¹⁷ or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase

Procedure Act § 5(d), 5 U.S.C. § 1004(d) (1958). The result here is that the Board is making Flota pay reparations for the period of the Board's delay.

¹⁶ The Board's holdings as to its delay in rendering a declaratory order, and as to the Panama Ecuador contract, were in effect conclusionary rejections of Flota's arguments. The Board answered Flota's contention that the law was unsettled by assuming that the law was settled by the Grace Line cases, a doubtful assumption at that stage. Finally, the Board felt that the operational difficulties of multiple loadings could be overcome by "the ingenuity of practical men." But Flota suggests that later events have shown that the Board was mistaken.

¹⁷ Section 22 of the Shipping Act provides only that the Board "may" direct the payment of reparation. 46 U.S.C. § 821 (1958).

of the proceeding.¹⁸ In any case, we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.¹⁹

The Board's order of June 22, 1959, challenged in No. 15,330, is affirmed; the order of March 30, 1961, challenged in Nos. 16,366 and 16,369, is set aside, and the matter remanded to the agency for further proceedings not inconsistent with this opinion.

So Ordered.

¹⁸ We have concluded that the Board could properly find after the first hearing that Flota had violated the Act. But this does not mean that the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed.

¹⁹ Our disposition of the case makes it unnecessary for us, at least at this time, to consider the remaining issues raised on this appeal. Thus, should the Board decide, on remand, that a different measure of reparations is warranted, Flota's arguments as to the calculation of damages might be rendered moot.

[fol. 758]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS,
INC., Intervenors.

No. 16,366

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

[File endorsement omitted]

On Petitions for Review of Orders of the Federal Maritime Board, now Federal Maritime Commission.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Washington, Circuit Judges.

JUDGMENT—April 26, 1962

These cases came on to be heard on the record from the Federal Maritime Board, now Federal Maritime Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court:

(1) that the order dated June 22, 1959, on review in case No. 15,330 is affirmed; and

(2) that the order dated March 30, 1961, on review in cases Nos. 16,366 and 16,369 is set aside, and these proceedings are hereby remanded to the Federal Maritime Commission for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge Washington.

Dated: April 26, 1962.

[fol. 759]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., 79 Pine Street,
New York 5, New York, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

[File endorsement omitted]

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION—Filed November 14, 1963

This is a petition to review a final order of the Federal Maritime Commission (the "Commission") pursuant to the opinion and order of remand by this Court dated April 26, 1962 (*Flota Mercante Grancolombiana v. Federal Maritime Com'n*, 302 F.2d 887, 896-97) (C. A. Nos. 15,330, 16,366 and 16,369). The Commission's order subject of this petition for review, was dated September 16, 1963 and served September 18, 1963, and was amended by an "Errata Sheet" dated October 9, 1963. The Commission therein directed petitioner Flota Mercante Grancolombiana, S.A. ("Flota") to pay to Philip R. Consolo "on or before 60 days from the date hereof, \$106,001.00, with interest at the rate of 6% per [fol. 760] annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916". A copy of the Commission's order and report served September 18, 1963, and "Errata Sheet" of October 9, 1963, both under designation of FMB Docket No. 827 (Sub. No. 1), are attached hereto as Exhibits 1 and 2.¹

Jurisdiction and Venue

This Court has jurisdiction to review this action of the Federal Maritime Commission under the Judicial Review Act of 1950, 5 U.S.C. § 1031 *et seq.* Venue is placed under 5 U.S.C. § 1033.

The Nature of the Proceeding

1. For a number of years, Flota, a steamship company, has provided freight service between United States North Atlantic ports and Ecuadorian ports. Flota's vessels have

¹ The earlier reports of the Commission's predecessor, the Federal Maritime Board (the "Board"), dated March 28, 1961, served March 30, 1961; (6 FMB 262) and dated June 22, 1959 served June 29, 1959, (5 FMB 633) are on file with this Court in Civil Action Nos. 15,330, 16,366, and 16,369 (consolidated) which culminated in the remand order of April 26, 1962, referred to above.

a limited amount of reefer (refrigerated) space, in one hold, in which it carried sporadic shipments of bananas to the United States from February 1950 until mid-1955. In accordance with long-standing practice, all such bananas were carried under written agreements; in each instance there was only one shipper on each vessel.

In July 1955, Flota entered into a contract with Messrs. Morey and Staff, for a lease of Flota's reefer space for a period of two years, plus an option for three additional years. That contract reserved to Flota the right to terminate the contract on seven days' notice, if any portion should be declared invalid. * * *

* * * * *

[fol. 761]

Grounds on Which Relief Is Requested

The Commission committed prejudicial error in each of the following respects:

1. The record compelled a finding that under all the circumstances, including the unsettled law and the Board's delay in acting on Flota's request for declaratory relief, it would be inequitable to force Flota to pay reparations. The Commission's conclusions as to "the individual and cumulative effects of the factors mentioned by the Court as they bear on the equities", and the Commission's accompanying reasons and findings, are inconsistent with the Court's opinion and findings, and in violation of the Court's order of remand; they are also factually inaccurate and incomplete in material respects, not supported by substantial evidence, and contrary to the record. Moreover the Commission did not consider or make findings with respect to "all the circumstances" demonstrating the inequity to Flota of forcing Flota to pay reparations (including but not limited to those set forth above), and it failed to consider or [fol. 762] make findings with respect to any of the circumstances called to its attention by Flota which demonstrated the lack of countervailing equities in Consolo's favor and that award of reparations to him would be in the nature of an unjust enrichment. In connection with this issue, Flota had no "duty to offer the space and give the shippers

the chance to devise cooperative means of using it", under the circumstances, absent prior arrangements by interested shippers to cooperate, communicated to Flota, with the appropriate undertakings and guarantees to Flota.

2. The record also compelled a finding that under all the circumstances it would be inequitable to force Flota to pay reparations calculated under the harsh measure of damages utilized by the Board and Commission. In this connection the Commission also erred in each of the respects set forth in the foregoing paragraph. Its finding that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith . . ." is contrary to the Court's finding and order of remand; is not supported by substantial evidence; and is contrary to the record. The Commission also erred by holding in effect that even if it accepted Flota's contentions as to the equities it was unable to devise a method to give effect thereto. It further erred by weighing against Flota the fact that the amount of its award "has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago".

3. The measure of damages employed by the Commission likewise is not the lawful and proper measure of damages for the particular statutory violations with which Flota was charged.

[fol. 763] 4. The Commission made no findings as to the character, intensity and effect of the competitive relationship between Consolo and the allegedly preferred shipper Panama Ecuador (as distinct from the fact of existence of a competitive relationship), did not consider this issue, and could not upon the record before it find proof thereof sufficient to sustain an award of reparations.

5. The Commission erred in failing to find that Consolo's claimed damages were hypothetical and speculative.

6. If Philip R. Consolo suffered any damages at all, it is impossible to determine through the maze of intercorporate transactions by which he imported bananas, the total

costs actually involved, what profits, if any, were lost by Consolo himself, as distinguished from corporations in which he had only a partial (or no) interest, and who, if anyone, was the proper claimant for damages. The Board's Examiner erred in refusing to permit Flota to inquire into these matters; and the Commission erred in denying Flota's request that the record be reopened. The Commission did not even mention, much less make findings or proper conclusions with respect to these matters.

7. If its measure of damages were appropriate, the Commission erroneously overstated the award, to Flota's prejudice, including in the following respects:

(a) The Commission in its calculation erroneously employed cost data representing not Panama Ecuador's cost of bananas as the Commission stated, but the cost of bananas imported from different and lower cost banana areas under Consolo's contract on Grace Line.

[fol. 764] (b) The Commission properly stated that the ocean freight rate to be employed in calculating reparations was that "actually charged by Flota when advertising space to several shippers", but in fact it erroneously disregarded or overlooked the minimum guarantee provisions of that rate.

(c) The Commission's reparations calculations improperly assumed, without supporting evidence or explanation, and contrary to the earlier recommendation of the Examiner, that if Consolo had had space on Flota's vessels to Philadelphia, Consolo could have obtained a lower stevedoring rate in Philadelphia than Consolo actually obtained in New York, and that Consolo would have negotiated as low a stevedoring rate in Philadelphia to unload only a partial cargo of bananas as Panama Ecuador was able to negotiate with the stevedores to unload the entire banana space and hence a much larger volume of bananas.

(d) The Commission should have reduced if not entirely eliminated the reparation period, for the period during which the law was unsettled.

(e) It should have reduced the reparations period to reflect delays for which the record compelled a finding that the Board, its Examiner, or the complaining shippers (including Consolo) were responsible.

(f) It should have excluded reparations for the period prior to November 15, 1957, because (1) that was the date by which Consolo demanded space, and (2) the Commission's order was entered only in Docket No. 827 (Sub. No. 1) in which Consolo sought damages only for the period beginning November 15, 1957.

8. The Commission erred in not finding that Consolo had a duty to mitigate damages and failed in that duty, including in the following respects:

[fol. 765] (a) He had one or more contracts with Grace Line throughout the reparations period but permitted Dover Banana Company in which he had only a minority interest to use the entire space. The Commission did not consider or even mention this issue but assumed contrary to the record that Consolo himself used the space in fact used by Dover Banana Company.

(b) Even Dover Banana Company did not use all the space under Consolo's contract with Grace Line. The Commission's statement that the award reflects this consideration is not correct.

(c) Consolo made no effort to charter suitable vessels although they were available. The Commission's statement that it would have been a hardship for him to charter ships is not supported by the record. Flota in fact made prima facie showing of availability of suitable vessels which Consolo never sought to rebut.

(d) Consolo did not use any space on the Chilean Line, available in the May to December season, except for about five shipments in late 1958.

9. Having found that Consolo sought to mitigate damages to the extent of making certain shipments on the Chilean Line late in 1958, the Commission thereafter erro-

neously failed to make a commensurate reduction in the reparations award.

10. The Commission erred in denying Flota's petition to reopen the record for the taking of additional evidence as to later events referred to by the Court and the additional matters referred to in Flota's petition to reopen.

11. The Commission did not comply with its minimum obligation under Section 8(b) of the Administrative Procedure Act to include in its decision "a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record".

Relief Sought

Petitioner respectfully prays that this Court:

1. Find that the Commission erred in the foregoing respects, and set aside and finally cancel the Commission's report and order served September 18, 1963 as amended, or remand the proceeding to the Commission with a direction that it dismiss the complaint and discontinue the proceeding;

2. In the alternative, if the Court does not set aside and cancel the order in entirety, that it set aside and cancel so much thereof as is necessary or appropriate to correct specific errors referred to above, and remand this proceeding to the Commission for reconsideration of the remaining issues in a manner consistent with the Court's opinion and findings; and

3. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Odell Kominers, J. Alton Boyer, 529 Tower Building,
Washington, D. C. 20005, Attorneys for Petitioner
Flota Mercante Grancolombiana, S.A.

November 14, 1963

[fol. 767]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 18235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

PETITION FOR REVIEW—Filed November 15, 1963

1. This is a Petition for Review of a portion of an order of the Federal Maritime Commission ("the Commission") insofar as such order denied petitioner the full relief sought. The Commission's order was entered under the Shipping Act, 1916, 46 U.S.C. 801, *et seq.*, and is reviewable under 5 U.S.C. 1031 ff. This Court has jurisdiction under 5 U.S.C. 1032. Venue is in this Court under 5 U.S.C. 1033. The United States of America is named as a respondent under 5 U.S.C. 1034. The Commission is named as a respondent under Rule 38(a) of this Court.

* * * * *

[File endorsement omitted]

[fol. 768]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
C. A. No. 18230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

SUPPLEMENT TO PETITION FOR REVIEW—Dated December 6,
1963 and filed January 6, 1964

Petitioner Flota Mercante Grancolombiana, S.A. hereby
supplements its Petition For Review, filed November 14,
1963, as follows:

Add the following new paragraph to page 8, following
the last sentence of paragraph 10, under the heading "The
Nature of the Proceeding":

"11. One or more members of the Commission's staff, including the Commission's General Counsel and Acting General Counsel engaged in the performance of prosecuting functions in the earlier proceedings in this and factually related cases, and thereafter participated and advised the Commission in the Commission's meetings and decision and order subject of this Petition for Review, as disclosed by the Commission's official minutes required to be kept pursuant to Section [fol. 769] 201(c), Merchant Marine Act, 1936, subject to judicial notice by this Court. Further, those minutes disclose that such members of the Commission's staff prepared a proposed report and order which the Commission thereafter issued as its own, without first disclosing their existence and without affording peti-

tioner an opportunity to submit exceptions thereto and supporting reasons for such exceptions."

Add the following new paragraph to page 13 following paragraph 11, under the heading "Grounds on which Relief is Requested":

"12. By the actions alleged in paragraph 11, under the heading 'The Nature of the Proceeding', the Commission violated Sections 5(c), 3(a), 7 and 8 of the Administrative Procedure Act, and its Order is accordingly void."

Respectfully submitted,

Odell Kominers, J. Alton Boyer, Attorneys for Petitioner, Flota Mercante Grancolombiana, S.A.

December 6, 1963
529 Tower Building
Washington, D. C. 20005

[File endorsement omitted]

[fol. 770]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230

C. A. No. 18235

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

PREHEARING STIPULATION—Filed December 16, 1963

The parties to the above proceedings Flota Mercante Grancolombiana, S. A., (petitioner in No. 18230 and intervenor in No. 18235); Philip R. Consolo, (petitioner in No. 18235 and intervenor in No. 18230); and respondents Federal Maritime Commission and United States of America (in both proceedings), by their respective attorneys, hereby stipulate as follows:

1. The parties will (and hereby do) jointly request the court to consolidate the above proceedings.

2. *Questions Presented.*

Counsel have conferred regarding stipulation of the issues herein, but have failed to reach agreement.

(a) Flota Mercante Grancolombiana, S. A., states the issues in case Nos. 18230 and 18235 as follows (upon the assumption they will be consolidated):

[fol. 771] "Where this Court had previously found 'substantial evidence' supporting petitioner's [Flota's] contentions that it would be inequitable to force it to pay reparations for violations of the Shipping Act, had set

aside a reparations order against Flota, and had directed the Federal Maritime Commission 'to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board':

"1. Whether the Commission erred in thereafter finding, contrary to the Court's findings, that there was no equity whatever in Flota's contentions; in refusing to permit further evidence, and in reinstating the principal portion of the vacated award, under the same measure of damages; whether it failed to consider and make findings upon all relevant circumstances and issues; and whether its findings, rulings, and conclusions are supported by substantial evidence, consistent with law, and sufficient to sustain its ultimate conclusions.

"2. Whether the preparation of the Commission's Report and Order and participation in the Commission's private meetings, by the same attorneys who had earlier contended to this Court that Flota had violated the Shipping Act and should be forced to pay reparations, and by their subordinates, and the failure to disclose these facts and to permit Flota to except to their undisclosed proposed report and order, violated sections 5(c), 3, 7, and 8 of the Administrative Procedure Act or deprived Flota of fair administrative procedure.

[fol. 772] "3. Whether the Commission overstated the reparations award, by understating costs, overstating the length of the reparations period, and failing to make proper findings upon the issue of mitigation of damages.

"4. [In case no. 18235], whether the Commission erred in reducing the former award in two respects and in denying the shipper's claim for prejudgment interest.

(b) Petitioner Philip R. Consolo states the issues as follows:

When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparation (in a second award after a remand from this court)

- (1) By computing the reparation award based on a freight rate in effect after the period of exclusion rather than using as a basis the freight rate actually in effect during the period of exclusion;
- (2) By computing the reparation award based on stevedoring costs at a port not served during the reparation period rather than the port served during the reparation period;
- (3) By denying interest both from the times of injury to the date of award, and from the date of the first reparation award.

(c) Respondents Federal Maritime Commission and the United States of America state the issues as follows:

- (1) Where the Court of Appeals remanded this case to the Commission "to consider whether, under all circumstances it is inequitable to force Flota to pay reparations, or at least inequitable to force [fol. 773] it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board," did the Commission, upon considering the equity of the award, as directed by the Court, properly reject Flota's claim seeking a reduction of, or elimination of reparations, on equitable grounds?
- (2) Did the Commission employ a lawful measure of damages in computing reparations?
- (3) In applying its measure of damages, did the Commission use accurate figures to represent gross

profit from sales of bananas; freight charges; and stevedoring and incidental expense?

- (4) Did the Commission err in denying Consolo interest from the date of each sailing from which he was unlawfully excluded, and in denying Consolo interest on the amount finally awarded (\$106,001.00) from 60 days after March 28, 1961, the date of the Board's first order awarding reparations to Consolo (\$143,370.98)?

• • • • •

[fol. 774]

J. Alton Boyer, Attorney for Petitioner Flota Mercante Grancolombiana.

Robert N. Kharasch, Attorney for Petitioner Philip R. Consolo.

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission.

Irwin A. Seibel, Attorney, Department of Justice.

[File endorsement omitted]

[fol. 775]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18230

C.A. No. 18235

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

ADDENDUM TO PREHEARING STIPULATION—Filed December
16, 1963

By typographical error, the parties omitted to include in the prehearing stipulation intervenor Philip R. Consolo's statement of the issues raised by Flota's petition for review, C.A. No. 18230. The following statement should be inserted directly below paragraph (3) under (b) on page 3 of the Prehearing Stipulation:

Intervenor Philip R. Consolo states the issues raised by Flota's petition as follows:

(4) When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparations (upon remand from this court) in finding in accordance with the issue posed by the order of remand that it was not "inequitable" to force the carrier to pay reparations found to be due.

[fol. 776] (5) [Consolo takes the position that issue #2 stated by Flota is not timely raised and not in issue.]

J. Alton Boyer, Attorney for Petitioner Flota Mercante Grancolombiana.

Robert N. Kharasch, Attorney for Petitioner Philip R. Consolo.

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission.

Irwin A. Seibel, Attorney, Department of Justice.

[File endorsement omitted]

[fol. 777]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA.

No. 18,235

PHILIP R. CONSOLO

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA.

Before: Burger, Circuit Judge, in Chambers.

PREHEARING ORDER—December 16, 1963

The prehearing stipulation of the parties and the addendum attached thereto, submitted pursuant to Rule 38(k)

of the General Rules of this court having been considered, the stipulation and addendum are hereby approved, and it is

ORDERED that the said stipulation and addendum shall control further proceedings in this case unless modified by further order of this court, and the stipulation and addendum shall be printed in the joint appendix of the parties herein.

Dated: Dec 16 1963

[File endorsement omitted]

[fol. 778]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLUMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents,

Before: Wilbur K. Miller, Wright, and McGowan, Circuit
Judges, in Chambers.

ORDER GRANTING MOTION TO SUPPLEMENT PETITION
FOR REVIEW—January 6, 1964

On consideration of petitioner's motion to supplement petition for review, of the memorandum of respondent Federal Maritime Commission in opposition thereto, of intervenor's answer to the motion, and of petitioner's reply to the answer, and it appearing that petitioner has lodged its supplement to the petition for review with the Clerk, it is

ORDERED by the court that the motion be granted, and the Clerk is hereby directed to file petitioner's supplement to the petition for review in this case.

Per Curiam.

Dated: Jan 6 1964

[File endorsement omitted]

[fol. 779]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

No. 18,235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

On Petitions for Review of an Order of the Federal
Maritime Commission.

[File endorsement omitted]

OPINION—Decided December 17, 1964

Mr. J. Alton Boyer, with whom *Mr. Odell Kominers* was on the brief, for petitioner in No. 18,230 and intervenor in No. 18,235.

[fol. 780] *Mr. Robert N. Kharasch*, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 18,235 and intervenor in No. 18,230.

Mr. David P. Simerman, Attorney, Federal Maritime Commission, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Messrs. James L. Pimper*, General Counsel, *Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents.

Before Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Washington, Circuit Judge.

Washington, Circuit Judge: This litigation is before us a second time. The background of the case is set forth in our first opinion, at 112 U.S.App.D.C. 302, 302 F.2d 887 (1962). In that opinion we concluded (1) that the Federal Maritime Board properly had before it the issue whether Flota had violated Section 14, Fourth, and Section 16, First, of the Shipping Act, 46 U.S.C. § 812 and 46 U.S.C. § 815, as well as the question whether Flota was a common carrier; (2) that the Board could properly find, as it did, that (a) Flota was a common carrier, (b) its contract with Panama Ecuador and its refusal to grant space to Consolo were unreasonable and unjust, and (c) it was therefore in violation of the Shipping Act; (3) that we have jurisdiction to review reparation orders to the extent necessary to determine their validity; (4) that the Board was within its discretion in (a) denying prejudgment interest to Consolo, (b) refusing to begin the reparation period before Consolo had requested from Flota a fair and equitable portion of space, and (c) selecting 18.46% as the percentage allotment of Flota's banana-carrying capacity and thus the

percentage of shipper's total computed net profit to which [fol. 781] Consolo was entitled; (5) that there was sufficient evidence to support a finding of competition between Consolo and Panama Ecuador. We did, however, hold that "the Board failed to give adequate consideration" to the question whether "the cumulative weight of all the circumstances . . . rendered it inequitable to require reparations." Our remand to the Federal Maritime Commission instructed it to consider this last question. *Supra*, 112 U.S.App.D.C. at 311; 302 F.2d at 896.¹

In remanding we indicated our view that Flota had marshalled substantial evidence in support of its contention that the imposition of reparations would be inequitable. We indicated our view that the law was unsettled during the period for which reparations were assessed and said that the Board's conclusion that the law was settled by the *Grace Line* cases was a "doubtful assumption." We pointed out that the evidence of factual differences between Flota's situation and that of the *Grace Line* "might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable." We also suggested that the time period of the Flota-Panama Ecuador contract might have seemed to be a reasonable one in light of the *Grace Line* decisions. We noted that Flota had reason to fear liability to Panama Ecuador had it complied with Consolo's demands for space in the absence of a declaratory order by the Board. Finally, we stated that "Flota . . . complained, with some justification, of the two-year delay of the Board in rendering a declaratory order," and that "The result here is that the Board is making Flota pay reparations for the period of the Board's delay." *Supra* at 311, 302 F.2d at 896. [fol. 782] These observations and expressions of opinion on our part were intended to serve as authoritative guide-

¹ The Federal Maritime Board had by then been succeeded by the Federal Maritime Commission. See our earlier opinion: 112 U.S. App.D.C. at 304, n.1, 302 F.2d at 889, n.1.

The Commission's decision here under review is F.M.C. Docket No. 827 (Sub. 1), issued September 18, 1963.

lines for the further deliberations of the Commission, to which we remanded the case for further proceedings not inconsistent with our opinion. We had hoped that further analysis or findings by the Commission would throw light on our initial impressions. We were prepared to affirm the Commission if it could establish that the circumstances were such as not to make it unfair to assess damages against Flota.

The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Notwithstanding our conclusion to the contrary, the Commission asserted that the law was not unsettled when Flota executed the contract with Panama Ecuador in May of 1957. Instead of considering whether Flota could in good faith believe that the structural differences in its ships would make a difference to the Board, the Commission asserted: "To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations." The Commission dismissed Flota's filing a petition for declaratory order as a self-serving act made to preserve appearances long after its wrongdoing. The Commission rejected our suggestion that Flota is being made to pay for the Board's own delay. It also rejected our suggestion that Flota might have believed in good faith that its three-year contract with Panama Ecuador would be acceptable to the Board, in view of the 1957 *Grace Line* opinion authorizing a two-year contract. The Commission said "we find it [fol. 783] impossible to understand how Flota could have held any such belief."

The reparation provision of the Shipping Act, 46 U.S.C. § 821, is not the ordinary mode for the Commission's

regulation of the shipping industry. The grant of reparations is discretionary. This agency, like the Interstate Commerce Commission, has a large range of enforcement powers to regulate its area of the economy.² If a party has good faith doubts about the applicability of a prior administrative adjudication to it, the party need not be its own judge. It can seek information from the agency about the applicability of the ruling to it. In our prior decision, we noted that "a primary purpose envisaged for it [a declaratory order by the agency] under the Administrative Procedure Act—[is] to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C.A. § 1004 (d)." *Supra* at 311, n. 15, 302 F.2d at 896 n. 15. If the course of action a party follows while the administrative determination is pending injures another and enriches itself, reparations to the injured party are frequently allowed. But if the course of action taken does not unduly enrich the party, and the asserted injury to another is only the loss of speculative profits, a real question arises whether reparations should be granted for the period of agency deliberation. Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy in such cases.

[fol. 784] We think that an objective and rational examination of all the evidence reveals such equitable factors in this case. It seems clear that Flota entertained serious doubts as to its legal obligations when Panama Ecuador exercised its renewal option in May 1957 and when Flota rejected Consolo's demand for space in August 1957. Flota's petition to the Board for a declaratory order in October 1957 is strong evidence of its good faith. The Commis-

² The reparations and other enforcement sections of the Shipping Act are closely modeled on the Interstate Commerce Act. S.Rep. No. 689, 64th Cong., 1st Sess. 13 (1916). Professors Jaffe and Nathanson note the decreased importance of reparations as an enforcement device in the Interstate Commerce Commission and the declining volume of reparations cases in that agency. JAFFE AND NATHANSON, *ADMINISTRATIVE LAW* 150-51, 389 (2d ed. 1961).

sion found that Flota could not have acted in good faith, since its legal obligations were clear under existing law. We do not agree. We consider Flota's conduct completely consistent with its asserted good faith belief that prior Board decisions did not compel it to break its contract with Panama Ecuador.

The reasonableness of Flota's behavior in 1957 must of course be viewed in the context of the legal situation which it was then confronting. The question facing Flota in May 1957 was not whether to undertake a new contractual obligation with Panama Ecuador, as the Commission implies, but whether to comply with its previously acquired contractual obligation to Panama Ecuador which had perfected its option for a three-year renewal under its 1955 contract with Flota. In 1955, at the time of the original contract, the only relevant Board statement was the 1953 *Grace Line* report. The report found Grace to be a common carrier of bananas and its exclusive contractual undertaking to be an unlawful discrimination, in violation of its statutory duty to apportion its facilities ratably among shippers; but the Board issued no order pursuant to its report. It discontinued the proceedings against Grace, even though Grace did not cancel its future booking contracts. Furthermore, the Board tacitly approved a two-year advance booking contract between Grace and the complainant Consolo despite the fact that the Board's report stated that six months was the "limit of reasonableness" for advance booking. 4 F.M.C. at 304. [fol. 785] In short, the Board discontinued its proceeding in the face of an arrangement at odds with the principles laid down in its report. The lack of precedential value of the 1953 *Grace Line* report is suggested by the Board's failure to cite it in its 1957 *Grace Line* decision, which dealt with substantially the same problem, except on a minor point as to the necessity of a tender. Under these circumstances, this report could hardly have been considered an "authoritative pronouncement," in 1955 or in May 1957, when the contract renewal option was exercised.

In deciding whether or not it was obliged to terminate its contract with Panama Ecuador in May 1957, Flota also had before it the Board's report of April 29, 1957, in the *Grace Line* matter, for such guidance as it provided.³ This report, holding that Grace was a common carrier of bananas, rested primarily on the unprecedented theory that since bananas were "susceptible to common carriage," they could be carried by a common carrier only under terms of common carriage. Grace had rejected the demands of the two complainant shippers for space; the Board concluded that "the record discloses no convincing [non-discriminatory] reason why any of these parties were denied space." 5 F.M.B. at 284. But the Board held that "in view of the economic problems presented here," a two-year forward-booking system, excluding qualified applicants during the two-year period, was reasonable. It said that Grace must cancel its contracts with existing shippers and offer reefer space under two-year forward-booking arrangements to all qualified shippers. Although an appealable Board decision is valid until reversed, it would be an exaggeration to say that this decision settled [fol. 786] the law in the area and provided a reliable foundation on which private parties could confidently plan their actions. The Board's "susceptibility" theory was without precedent; the result was inconsistent with long-standing industry practice; and Grace promptly appealed the decision to the Second Circuit Court of Appeals.⁴

We are satisfied that Flota, faced with a threatened lawsuit by Panama Ecuador, acted on the basis of reasonable doubts whether its contract with Panama Ecuador

³ 5 F.M.B. 278. This report, issued April 29, 1957, was followed by an order issued August 19, 1957, see 5 F.M.B. 286. In May 1957 there was, of course, the possibility that the Board would not issue an order pursuant to its report, as in the first (1953) *Grace Line* matter.

⁴ The decision was reversed by the Second Circuit and remanded. 263 F.2d 709. The Board subsequently found Grace to be a common carrier under a different theory, 5 F.M.B. 615 (1959), and the Second Circuit affirmed the decision over a strong dissent, *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (1960).

was prohibited by the Shipping Act.⁵ Flota's counsel had good grounds to believe that the second *Grace Line* report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract.

First, Flota might reasonably have believed that its situation was factually distinguishable from Grace's—that physical differences between Flota's ships and Grace's saved Flota's exclusive contract from being held an unreasonable discrimination. The Shipping Act prohibits [fol. 787] "unfair or unjustly discriminatory" contracts (46 U.S.C. § 812, Fourth) and the grant of "undue or unreasonable preference or advantage to any particular person" (46 U.S.C. § 815, First). The standard of violation has built into it the concepts of fairness and reasonableness; discrimination and preferences are not per se prohibited. Hence, an agreement that might be unreasonably discriminatory if entered into by one shipping company might be entirely proper, given a different factual setting, for another company. In stressing that the factual issues were crucial to the Board's decision in *Grace Line*, public counsel in his brief in the Flota case noted that the 1957 *Grace Line* decision

"held that the carrier's duties to banana shippers would depend upon the factual circumstances attending the loading, transportation, and discharge of the bananas."

The *Grace Line* decision clearly did not settle the matter of the shipping companies' obligations for the entire ba-

⁵ Flota's contract with Panama Ecuador contained the following clause:

"If any provision or term hereof be invalid or unenforceable for any reason, Grancolombiana [Flota] shall have the right to terminate this contract by giving seven (7) days' written notice of termination to lessee"

Of course, this provision did not relieve Flota of liability to Panama Ecuador if Flota guessed wrong and terminated a contract ultimately found to be valid, and Panama Ecuador had threatened legal action if Flota leased any of its space to Consolo.

nana shipping industry.⁶ The physical differences between Flota's and Grace's ships would make it more difficult for multiple shippers to load and stow on Flota's ships and might so disrupt its schedules as to require it to forego the carriage of bananas.⁷ That Flota's contentions in this [fol. 788] respect were far from frivolous is evidenced by respondents' justification, given in oral argument, for the Board's delay in acting on Flota's petition for declaratory judgment: "The complexity of the issues raised by Flota before the Board were not capable of resolution overnight; indeed, in reading the Examiner's decision on the violation phase of this proceeding, it goes into great detail over the loading problem and the refrigeration problem" ⁸ To suggest now that Flota could not have had a good faith belief that these differences were significant,⁹ after lengthy hearings were required by the Board to satisfy itself whether or not they were dispositive, is

⁶ The Board held that Grace Line had not presented facts indicating that its discrimination was reasonable. It left open the possibility that, in some future case, another shipping company could show that its exclusive booking contract for the shipment of bananas was reasonable.

⁷ It seems uncontroverted that Grace's vessels had two and three reefer holds each, only two decks in each hold, and permanent compartments, specially designed to carry bananas. Flota's single reefer hold was designed to carry frozen cargo and had, *inter alia*, three decks; no compartments, fewer and smaller side ports; steeper (and hence more difficult to use) exterior and interior ramps; heavy cumbersome hatch plugs; and greater problems of refrigeration, exhaust, opening, closing and leakage of air.

⁸ In its decision, the Commission also justified its delay as necessary because of the "complex and lengthy hearing into the physical characteristics and utilization of its [Flota's] vessels so far as the banana trade was concerned."

⁹ The Hearing Examiner in the 1957 *Grace Line* case noted that even as to Grace's superior facilities "*Consolo's* Ecuador manager is thoroughly convinced that utter confusion would exist were there a number of shippers of bananas." (Emphasis supplied.) And the Examiner here found that "the problems attendant upon the use of the Flota facilities may be more accentuated than those encountered by the shippers of bananas on the Grace vessels."

to ignore substantial justifications for Flota's course of action in May 1957.¹⁰ [fol. 789] Besides its grounds for factually distinguishing the 1957 *Grace Line* case, Flota might have thought in good faith that its renewal agreement with Panama Ecuador was permissible within the standards set forth in the *Grace Line* decision. That decision states that once the shipping company has properly entered into a forward-booking agreement with one or more shippers for a reasonable period, qualified shippers who subsequently applied for space "would be foreclosed from any proration in the space until the end of . . . [the] given period." 5 F.M.B. at 285. Flota might reasonably have thought that its contract with Panama Ecuador was such a legitimate forward-booking agreement.

The Board's 1957 report in *Grace Line* stated that the duty to apportion space among several shippers arises "where the demand for space exceeds the supply." 5 F.M.B. at 284. That report left open the question of what efforts a steamship company must make to interest shippers in its space. It stated that a shipping company must provide "reasonable notice" before entering a forward-booking arrangement.¹² 5 F.M.B. at 286. Flota might

¹⁰ It is worth noting that the banana shippers consolidated their shipments under a single operating corporation for purposes of shipping on Flota, after it opened its reefer space for multiple use in June 1959. This development lends credence to Flota's asserted belief that its reefer space was unsuitable for use by several shippers operating independently. Nothing in the 1957 *Grace Line* decision suggests that a shipping company whose ships *cannot*, as a matter of economic fact, be used for shipping by more than one banana shipper, must apportion its space among qualified shippers in the hope that they can arrange to unify their operations.

¹¹ The Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 792 (1960), tacitly recognized the possibility that a carrier may enter into an exclusive contract where "there are no competing shippers for the space granted to a preferred shipper."

¹² The order, issued on August 19, 1957, after the Panama Ecuador renewal had been executed, is more specific. It states that Grace

"shall offer to its present shippers and to all qualified shippers . . . , upon a fair and reasonable basis and upon reasonable

[fol. 790] reasonably have thought that its actions in 1955 and 1957 satisfied the requirement of providing notice to other shippers. In 1955, just prior to its entering into the basic contract with Panama Ecuador, it advertised for shippers, but received no bids in response to its advertisements. In 1957, prior to Panama Ecuador's exercise of its option, on advice of counsel, Flota considered proposals from other bidders. Pursuant to this policy, Flota gave notice to Consolo on February 26, 1957, advising him to submit a bid for the refrigerated space by a given date. There was nothing in this letter suggesting that Consolo could only bid for Flota's *entire* refrigerated space. Consolo and another bidder bid only for the exclusive use of the entire space.¹³ No bids for less than all the space were received. While the Board could reasonably insist that Flota's obligation was actively to solicit apportioned bidding rather than merely to accept offers for apportioned space, this issue was certainly not *settled* by either *Grace Line* report.

Furthermore, Flota could reasonably have believed that the three-year period in its contract with Panama Ecuador, made in compliance with its existing contract obligation and formalized after no bids for an allocation of space had been received, was reasonable under Board standards. The agency found it "impossible to understand" that Flota could, in good faith, entertain such a belief. Yet the Board had held Grace's two-year contracts to be of reasonable duration "in view of the economic problems presented here [in Grace's case]." Given Flota's previous unsatisfactory experience in selling its reefer space, compared to the vigorous competition among shippers for Grace's superior [fol. 791] facilities, the Board might well have found a three-year period to be permissible in Flota's case.

notice, refrigerated space for the carriage of bananas"
5 F.M.B. 287.

¹³ We have already indicated that Flota incurred no liability for rejecting these bids. See 112 U.S.App.D.C. at 310, 302 F.2d at 895.

The above factors, in our view, justify Flota's doubts in May, 1957, as to whether it had a legal obligation to cancel its contract with Panama Ecuador.

On August 23, 1957, Consolo demanded a portion of the space on Flota's vessels, threatening legal action if Flota did not comply with its demands. Panama Ecuador threatened legal action if Flota leased any of its space to Consolo. Contrary to the Commission's assertion, there is no evidence to suggest that Flota was reluctant to repudiate its contract with Panama Ecuador "because it preferred the advantages of its long-term exclusive arrangement." Rather, in the face of pressures from both sides and uncertain as to its legal duty, Flota, on October 1, 1957, requested a ruling from the staff of the Board. Having received no answer to its request, on October 30, 1957, Flota petitioned the Board for a declaratory order. Not until six months had passed—on May 1, 1958—did the Board even assign a docket number to this petition; at that time it consolidated Flota's petition with Consolo's complaint seeking reparations, notwithstanding Flota's constant attempts to have its petition promptly determined, without introducing the complicated reparation issue.¹⁴ We need not undertake a detailed examination of the specific incidents of delay. Suffice it to point out that the principal reason for much of the further delay until mid-November 1958, when Flota presented its case, was Consolo's insistence on consolidating its reparation claim with Flota's petition. Furthermore, regardless of the cause of the delay, the fact remains that virtually the entire period for which reparations [fol. 792] were assessed covered the time when Flota's petition for a declaratory order was pending before the Board. Confronted with a difficult choice on the basis of uncertain law, Flota had sought an administrative determination of its duties as promptly as possible. On the facts of this case, it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion.

¹⁴ Subsequently, on November 14, 1958, over a year after Flota first petitioned for a declaratory order, the trial examiner severed the reparation issue. A reparation order did not issue until March 30, 1961.

Despite these factors indicating the inequity of the assessment of damages against Flota under the circumstances, the Commission nevertheless declared that "Flota . . . is seeking to escape the consequences by passing the burden of its wrongdoing to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity." We think, however, that Consolo's position is hardly deserving of greater sympathy than Flota's. In the first place, the only "pecuniary brunt" which he bore was the loss of unrealized profits he might have made had he utilized the space which Flota failed to make available. Although Flota's action deprived Consolo of potential profits, there is no evidence that Flota in any way benefited by its exclusion of Consolo. The damages assessed by the Board are not designed to deprive Flota of illegal profits; indeed, they bear no relation to the profits Flota did or did not make on its contract with Panama Ecuador. The latter, the party which benefited from the allegedly illegal arrangement to the detriment of Consolo, was not compelled (by the nature of the remedy) to part with its "illegal" profits. In addition, Consolo himself for four years prior to the Board's 1957 *Grace Line* order (effective October 1, 1957), had received the pecuniary benefits of a preferential arrangement with Grace Lines, held to be unlawful. He was never compelled to give up those profits to shippers that had been excluded.

In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of [fol. 793] Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act¹⁵ in imposing reparations on petitioner. Accordingly, we reverse the Commission's decision of September 18, 1963, and direct it to vacate its reparation order issued thereunder.¹⁶

So ordered.

¹⁵ 46 U.S.C. § 821.

¹⁶ In view of our disposition of this case it is unnecessary to consider petitioner's objection to the active participation of the Commission's counsel, who had earlier appeared before this court as an adversary, in the formulation and writing of the Commission's remand opinion.

[fol. 794]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

No. 18,235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

On Petitions for Review of an Order of the Federal
Maritime Commission.

Before: Bazelon, Chief Judge, and Wilbur K. Miller,
Senior Circuit Judge, and Washington, Circuit Judge.

JUDGMENT—December 17, 1964

These cases came on to be heard on the record from the
Federal Maritime Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged
by this court that the decision of the Federal Maritime
Commission on review herein is reversed, and these cases
are remanded to the Commission with directions to vacate
its reparation order issued thereunder.

Per Circuit Judge Washington.

Dated: Dec 17 1964

[File endorsement omitted]

[fol. 795]

SUPREME COURT OF THE UNITED STATES

No. 992, October Term, 1964

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI—June 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is placed on the summary calendar and set for argument immediately following No. 606.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED

MAR 16 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. **2** 63

PHILIP R. CONSOLO, *Petitioner,*

v.

FEDERAL MARITIME COMMISSION,
UNITED STATES OF AMERICA,
and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
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March 16, 1965



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STATUTES

Administrative Orders Review Act of 1950 (Hobbs Act, 5 U.S.C. 1031 et seq.):

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Shipping Act, 1916, as amended, 46 U.S.C. 801 et seq.:

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No.

PHILIP R. CONSOLO, *Petitioner*,
v.
FEDERAL MARITIME COMMISSION,
UNITED STATES OF AMERICA,
and
FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 694) is not yet reported. It is set forth as Appendix B hereto, pp. 6a-19a. The prior opinion of the Court of Appeals which remanded the case to the Federal Maritime Commission is reported in 112 App. D.C. 302, 302 F. 2d 887, and set forth as Appendix C hereto, pp. 20a-37a. The opinion of the Federal Maritime Board, which was

remanded by the prior Court of Appeals decision, is reported in 6 F.M.B. 262, and set forth herein as Appendix D, pp. 38a-55a. The opinion of the Federal Maritime Commission on remand is reported at 2 Pike and Fischer Shipping Regulation Reports 961. It is set forth herein as Appendix E, pp. 56a-71a.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on December 17, 1964. (R. 709; Appendix F, p. 72a). The jurisdiction of this Court is invoked under 5 U.S.C. § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Where the Federal Maritime Commission found that a common carrier by water had discriminated against a shipper by denying him space in violation of Sections 14 and 16 of the Shipping Act, 46 U.S.C. §§ 812, 815, and entered an order awarding reparation to the injured shipper:

1. Did the Court of Appeals have jurisdiction under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C.A. § 1031 et seq., to review the reparation order on petition of the carrier, thus subjecting the shipper to a double set of judicial proceedings in enforcement of a reparation order, or was it required to relegate the carrier to the defense of a suit brought by the shipper in a district court under Section 30 of the Shipping Act, 46 U.S.C. § 829, thereby preserving the venue and other advantages which Section 30 affords to shippers?

2. Was the Court of Appeals correct in announcing a new standard for award of reparation: that the

Commission should find reparation to be "equitable" in addition to finding the carrier's discrimination to be unjust and unreasonable?

3. When the Commission upon remand found that award of reparation was equitable and found as a fact that the carrier's defenses were not bona fide, did the Court of Appeals apply a proper standard for review in setting aside the order by making its own contrary findings of fact?

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 46 U.S.C. 801 et seq. and the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Also involved is the Interstate Commerce Act, 49 U.S.C. 1 et seq. Pertinent provisions of sections 14, 16, 22, 29, 30 and 31 of the Shipping Act; sections 1031, 1032, 1039, and 1040 of the Hobbs Act; and section 16(2) of the Interstate Commerce Act, are set forth in Appendix A hereto, pp. 1a-5a.

STATEMENT OF THE CASE

Petitioner Philip R. Consolo ("Consolo") is an independent importer of bananas; such independent importers depend on Ecuador as a source of supply. Flota Mercante Grancolombiana ("Flota") is a steamship line operating a regular common carrier service from Ecuador to United States Atlantic ports with vessels having refrigerated space suitable for carrying unripe bananas.

In early 1957 Flota knew that Consolo desired refrigerated space and had invited him to "bid" for space. The Federal Maritime Board, the agency then administering the Shipping Act, 1916, had twice held

that Flota's competitor on the route was obliged as a common carrier to allocate space fairly to all banana shippers.¹ Flota, without seeking advice or a ruling from the Federal Maritime Board, made an exclusive-dealing contract with another banana shipper, and denied Consolo any space.

Consolo filed a complaint with the Federal Maritime Board seeking (1) an order requiring Flota to allot him space and (2) reparation for the exclusion. After receiving warning that the complaint was about to be filed, Flota filed a petition for declaratory order with the Board.

After hearings, the Federal Maritime Board held that Flota's exclusion of Consolo was an unjust and unreasonable discrimination and violated Flota's duties as a common carrier under Sections 14 and 16 of the Shipping Act, 1916, 46 U.S.C. §§ 812, 815, ordered Flota to allocate its space fairly, and set a further hearing on reparation.² The Board's examiner found Consolo entitled to reparation in the amount of \$259,812.26. The Board's unanimous report on reparation reduced the award to \$143,370.98, and ordered Flota to pay (Appendix D, p. 55a). Flota did not pay.

Flota filed petitions for review in the Court of Appeals for the District of Columbia Circuit, claiming

¹ *Consolo v. Grace Line*, 4 F.M.B., 293 (1953); *Banana Distributors v. Grace Line*, 5 F.M.B. 278 (1957), remanded sub nom. *Grace Line v. Federal Maritime Board*, 263 F. 2d 709 (C.A. 2, 1959), on remand 5 F.M.B. 615 (1959), aff'd 280 F. 2d 790 (C.A. 2, 1960), cert. denied 364 U.S. 933.

² *Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633, 643 (1959).

that jurisdiction to review the Board's order finding violations of the Shipping Act and the reparation order existed under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Consolo filed a petition for review seeking to have the amount of the award increased.³

Consolo moved to dismiss Flota's petition for review of the reparation order on the ground that the Court of Appeals had no jurisdiction to review a reparation order on petition of a carrier. Consolo argued that Section 30 of the Shipping Act, 46 U.S.C. § 829, provides the exclusive procedure for enforcement of a reparation order by suit upon the order in a United States District Court where the Board's finding would be prima facie evidence. [This is the same jurisdictional question under the Hobbs Act as is raised under the Interstate Commerce Act by the Petition in *Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.*, No. 606 of this term, certiorari granted January 18, 1965, 379 U.S. —, 85 S.Ct. 658. The reparation procedure under the Shipping Act (46 U.S.C. § 829), is almost identical to that under the Interstate Commerce Act (49 U.S.C. § 16(2))].

The Court of Appeals: (1) affirmed the Board Report and Order finding Flota guilty of violating the Shipping Act (302 F. 2d at 891; Appendix C, pp. 29a-30a); (2) considered the jurisdictional question, finding it "not free from doubt or difficulty" (302 F. 2d at 894, Appendix C, p. 31a), and conceded that "A strong argument can be made that only one review should

³ Consolo's petition followed the holding in *D.L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954, cert. denied 348 U.S. 839) that denials of reparation are reviewable under the Hobbs Act.

be permitted. . . ." (302 F. 2d at 894, Appendix C, p. 32a), but held that reparation orders are reviewable under the Hobbs Act (302 F. 2d at 894, Appendix C, pp. 32a-33a); and (3) announced (without citation of precedent), a new standard for reparation orders, holding that the Board should consider whether it would be "inequitable to force Flota to pay reparations"—remanding for such a determination (302 F. 2d at 896, Appendix C, p. 37a).

Upon remand, the Federal Maritime Commission, which by then had succeeded to the duties of the Federal Maritime Board, considered Flota's excuses for its conduct, and unanimously found: (1) that Flota's excuses were not bona fide; (2) that payment of reparation would be equitable; and (3) ordered Flota to pay reparation in the reduced amount of \$106,001.00. (Appendix E, p. 71a).

Flota again petitioned the District of Columbia Court of Appeals for review of the Commission's order. The Court purported to review the evidence, made its own findings as to what Flota "might reasonably have believed", (Appendix B, p. 13a), and "might have thought", (Appendix B, p. 15a), and directed the Commission to vacate its reparation order.

Consolo's suit under Section 30 of the Shipping Act, 46 U.S.C. § 829, in the United States District Court for the District of Maryland for enforcement of the Commission's award has not come to trial.

REASONS FOR GRANTING THE WRIT

1. This case presents an important and novel question as to jurisdiction to review Shipping Act reparation orders under the Administrative Orders Review Act of 1950 (Hobbs Act) 5 U.S.C. 1031, et seq.

A highly similar question as to jurisdiction to review reparation orders under the Interstate Commerce Act is presented in *Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.*, No. 606 of this term, certiorari granted January 18, 1965, 379 U.S. —, 85 S.Ct. 658.

The Shipping Act reparation provisions were modeled on the Interstate Commerce Act. Section 22 of the Shipping Act, 46 U.S.C. § 821, permits the agency to enter orders directing payment "of full reparation to the complainant for the injury caused by such violation" [of the Act]. If the carrier does not pay, Section 30 of the Shipping Act, 46 U.S.C. § 829, like Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), permits the injured shipper to bring suit in United States District Court in the District where he resides or where the carrier is found; makes the agency order "prima facie evidence of the facts therein stated"; excuses the shipper from payment of costs; and provides for award of "a reasonable attorney's fee" to a prevailing shipper.

Under both the Shipping Act and the Interstate Commerce Act, the long-established practice of carriers against whom reparation orders have been entered has been to await suit on the orders, and raise defenses in such suits: *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941) (Shipping Act); *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 422 (Interstate Commerce Act). This case is the first time a carrier has sought to multiply reviews under the Shipping Act; No. 606 is said to be the first case where carriers have sought to institute their own proceeding for review under the Interstate Commerce Act. Here, as in No. 606, the carrier's action deprives the injured shipper of the advantages of the explicit statu-

tory provisions as to venue and the statutory benefits of freedom from costs and payment of attorney's fees.

The Court of Appeals' holding here that it has jurisdiction to review a reparation order in advance of a District Court suit creates an intolerably long sequence of litigation for any shipper injured by a recalcitrant carrier. At common law, the remedy for a shipper denied space by an ocean carrier was swift and simple—the shipper sued the carrier: *Swayne & Hoyt v. Everett*, 255 Fed. 71 (C.C.A. 9th, 1919). The Shipping Act substituted a chain of litigation whereby the shipper first obtained an agency finding that the carrier had unjustly discriminated, then obtained an agency order for reparation, and then sued on the agency order under Section 30 of the Shipping Act in District Court.

The Court of Appeals, by claiming jurisdiction to review reparation orders under the Hobbs Act, would convert a difficult schedule of litigation into an intolerable one. If the Court of Appeals were right, an injured shipper must at a minimum: (1) file his complaint and succeed before the agency in proving a violation of the Shipping Act; (2) defend a favorable finding on review; (3) prove his entitlement to reparation; (4) then defend the reparation order on review by the Court of Appeals; (5) if still successful, file suit in District Court upon the reparation order; and (6) defend the District Court award on appeal. Such a procedure would mean in practice that the reparation provisions of the Shipping Act were repealed—as the Court of Appeals appears to have recognized (see Appendix B, Note 2, p. 10a). The Court of Appeals here denigrated the importance of reparation orders, saying: "The reparation provision . . . is not the ordinary mode for the Commission's regulation of

the shipping industry." (Appendix B, p. 9a). This Court, in contrast, has emphasized the importance of protecting shippers' rights to reparation: *United States v. Interstate Commerce Commission*, 337 U.S. 426;⁴ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88.

In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 440-43, this Court discussed in detail apportionment of duties between a single district judge and a three-judge statutory court in reviewing I.C.C. orders denying reparation. The Court held that reparation orders were for consideration of one judge, not a three-judge court. Originally, the Shipping Act, in Section 31, 46 U.S.C. § 830, called for three-judge review of agency orders *except reparation orders* which were governed by Section 30, 46 U.S.C. § 829. While the Hobbs Act (5 U.S.C. § 1032) now substitutes Court of Appeals review for three-judge review for such final orders "as are now subject to judicial review pursuant to the provisions of Section 830 of Title 46", the Hobbs Act says nothing as to reparation orders which remain subject to the special one-judge provisions of Section 829 of Title 46. The Court of Appeals, by claiming jurisdiction to review reparation orders in advance of suit upon such orders before a single judge, is thus in direct conflict with this Court's holding in *United States v. Interstate Commerce Commission*, 337 U.S. 426. It is also in direct conflict with this Court's statement in *H. K. Porter Co. v. Central Vermont Railway*, 366 U.S. 272, 274 at note 6, that reparation orders "can be challenged before a single judge under 49 U.S.C. § 16(2)."

⁴ The dissent in *United States v. Interstate Commerce Commission* also emphasizes that "Money damages are part of the regulatory scheme." 337 U.S. 426 at 458.

The Court of Appeals holding here is also in direct conflict with this Court's repeated explanations of the purpose of allowing attorney's fees in reparation suits:

"The purpose of Congress in making the provision concerning costs was to discourage harrassing resistance by a carrier to a reparation order."

St. Louis & S.F. R. Co. v. Spiller, 275 U.S. 156, 159, quoted and amplified in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 482-83.

"Harrassing resistance" depriving the injured shipper of the benefits of the Congressional purpose has been the carrier's tactic here; it will be the tactic in all future cases if the decision below is allowed to stand. The jurisdictional question raised here is as important, or more important, to all future shippers by water carriers as the same question raised in No. 606 is to all shippers by rail.

2. The jurisdictional holding of the court below is hostile to the rights of injured shippers. Two additional holdings, one substantive and one procedural, are of equal—and disastrous—significance to all future shippers. Both of these holdings are of general future application; both are in conflict with the settled law of reparation announced and applied by this Court and the federal courts generally over the past half-century.

First, the Court of Appeals held that notwithstanding the agency's finding that the carrier's unjust and unreasonable discrimination had injured the shipper, before awarding reparation the agency must consider in addition "whether, under all the circumstances, it is inequitable to force Flota to pay reparations. . . ."

(302 F. 2d at 896, Appendix C, p. 37a.) This is a new substantive rule of law. It was unsupported by citation; the requirement of an "equitable" finding nowhere appears in the statute; and we believe such a rule is mentioned nowhere in any other reported reparation decision.

While the right of an agency to find a rate or practice unreasonable as to the future but not as to the past has been recognized, when an agency has found a rate or practice unreasonable as to the past, all previous cases have emphasized that reparation is due: *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941) (exclusion violating Shipping Act); *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936) (railroad refusal to supply cars); *Baltimore & O. R. Co. v. Brady*, 288 U.S. 448 (unjust allocation of coal cars); *Pennsylvania R. Co. v. Weber*, 257 U.S. 85 (unjust allocation of coal cars); *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (overcharge).

Because the Shipping Act's reparation procedure is modeled on the Interstate Commerce Act, the decision below would apply to both statutes. *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 480-82; *Swayne & Hoyt v. United States*, 300 U.S. 297, 303-4. Future injured shippers would not only have to prove a violation of the appropriate statute, and their damages, but also that payment would be "equitable". The injection of such a vague standard into the law of reparation would confer upon the regulatory agencies an excuse for denying redress not provided by Congress; it would permit all future carrier defendants to complicate further already complex reparation hearings; and, since there is no existing body of law as to when it is "equitable" to pay for illegal action, it

would leave agencies in all future cases without any established guides for decision.

The decision below works a fundamental change in the interpretation of statutes of major importance. The question whether a new barrier to the award of reparation can be suddenly discovered in the transportation statutes after a half century of litigation merits the urgent attention of this Court.

Second, when the court below returned the reparation award to the agency for "equitable" consideration, the language of the decision strongly implied that the agency, not the court, was to determine the "equities". (302 F. 2d at 896, Appendix C, p. 37a.) The Court of Appeals noted, and said it would follow, the usually-cited precedents restricting the scope of review (302 F. 2d at 894, Appendix C, p. 33a), and refused itself to decide the "equities." (302 F. 2d at 896, Appendix C, p. 37a).

Upon remand, the Federal Maritime Commission unanimously found that the carrier's excuses for excluding the shipper were not *bona fide* excuses, and unanimously held that payment of reparation would be equitable.

Thereupon, on second review, the Court of Appeals set aside the Commission's order because *it* (the Court of Appeals) found that the carrier "might reasonably have believed" or "might have thought in good faith" or "could reasonably have believed" in various excuses. (Appendix B, pp. 13a, 15a, 17a). The Court below did *not* hold that there was not substantial evidence to support the Commission's decision; instead, it said that there was "substantial evidence showing that it would be inequitable to assess damages against Flota. . . ." (Appendix B, p. 19a.) Again, no precedent was cited.

Thus, the Court below not only held that the statute contained a hitherto-unknown requirement of "equity"; it also held that the power to decide what was "equitable" lay in the Court, not in the agency. This doctrine is in flat conflict with all precedents dealing with review of reparation orders. It is, for example, in conflict with the decision in *New Process Gear Corp. v. New York Central R. Co.*, 250 F. 2d 569, 572 (C.A. 2, 1957), cert. denied 356 U.S. 959.

Prior to the decision below, the scope of review of reparation orders was well understood, and well understood to be limited. Thus, in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 334 F. 2d 46 (C.A. 5, 1964) (the case now under review as No. 606), the Court of Appeals argued in support of review prior to suit on an I.C.C. reparation order that (334 F. 2d at 49, note 12):

"All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustice or unreasonableness of rates, discriminatory practices, and the like."

The trouble with the decision below in this case is not merely that it contravenes accepted rules for division of functions between courts and agencies. The Court below in this case has purported to find a new standard for agency grant of reparation ("equity") which escapes the otherwise-settled bounds of court review. Under the new standard, the Court below holds that the evidence is to be weighed by the reviewing Court, not the agency.⁵ Thus, a new and self-contained doc-

⁵ That the Court itself was weighing the evidence is clear: "... the Commission's determinations ignores ... the substantial weight of the evidence." (Appendix B, p. 9a).

trine has been announced, avoiding the accepted principle of review. This doctrine would be applicable to all future judicial review of reparation orders.

If the purported discoveries of both a new substantive standard in the statute and a new procedural power in the Courts of Appeals are in conflict with the decisions of this Court and other Federal courts—as Petitioner urges—then the conflicts are major, and merit this Court’s resolution. If, however, the established rules of judicial review are not applicable to the new “equity” doctrine, then there has been raised an equally important question of federal law, which should be, but has not been, settled by this Court.

CONCLUSION

The issues presented by the decision below involve questions of jurisdiction, substance, and procedure affecting all future reparation proceedings under the Shipping Act and the Interstate Commerce Act, which should be settled by this Court. The decision below is in conflict with applicable decisions and principles laid down by this Court and followed by other federal courts. For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 16, 1965

APPENDIX A

A. Pertinent provisions of the Shipping Act, 1916, as amended, 46 U.S.C. § 801 et seq. read as follows:

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

§ 16. It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever:

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not

satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

§ 31. The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

B. Pertinent provisions of the Administrative Orders Review Act of 1950, 5 U.S.C. § 1031 et seq. read as follows:

§ 1031. As used in this chapter—

(a) "Court of appeals" means a court of appeals of the United States.

(b) "Clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed.

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed.

(d) When the order sought to be reviewed was entered by . . . the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require;

§ 1032. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, . . . (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

§ 1039. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency. . . .

§ 1040. An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided*, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the

Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further*, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

C. Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

§ 16(2). If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

PHILIP R. CONSOLO, INTERVENOR.

No. 18,235

PHILIP R. CONSOLO, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., INTERVENOR.

On Petitions for Review of an Order of the
Federal Maritime Commission

Decided December 17, 1964

Mr. J. Alton Boyer, with whom *Mr. Odell Kominers* was on the brief, for petitioner in No. 18,230 and intervenor in No. 18,235.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 18,235 and intervenor in No. 18,230.

Mr. David P. Simerman, Attorney, Federal Maritime Commission, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Messrs. James L. Pimper*, General Counsel, *Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents.

Before **BAZELON**, Chief Judge, **WILBUR K. MILLER**, Senior Circuit Judge, and **WASHINGTON**, Circuit Judge.

WASHINGTON, Circuit Judge: This litigation is before us a second time. The background of the case is set forth in our first opinion, at 112 U.S. App. D.C. 302, 302 F.2d 887 (1962). In that opinion we concluded (1) that the Federal Maritime Board properly had before it the issue whether Flota had violated Section 14, Fourth, and Section 16, First, of the Shipping Act, 46 U.S.C. § 812 and 46 U.S.C. § 815, as well as the question whether Flota was a common carrier; (2) that the Board could properly find, as it did, that (a) Flota was a common carrier, (b) its contract with Panama Ecuador and its refusal to grant space to Consolo were unreasonable and unjust, and (c) it was therefore in violation of the Shipping Act; (3) that we have jurisdiction to review reparation orders to the extent necessary to determine their validity; (4) that the Board was within its discretion in (a) denying prejudgment interest to Consolo, (b) refusing to begin the reparation period before Consolo had requested from Flota a fair and equitable portion of space, and (c) selecting 18.46% as the percentage allotment of Flota's banana-carrying capacity and thus the percentage of shipper's total computed net profit to which Consolo was entitled; (5) that there was sufficient evidence to support a finding of competition between Consolo and Panama Ecuador. We did, however, hold that "the Board failed to give adequate consideration" to the question whether "the cumulative weight of all the circumstances . . . rendered

it inequitable to require reparations." Our remand to the Federal Maritime Commission instructed it to consider this last question. *Supra*, 112 U.S. App. D.C. at 311; 302 F.2d at 896.¹

In remanding we indicated our view that Flota had marshalled substantial evidence in support of its contention that the imposition of reparations would be inequitable. We indicated our view that the law was unsettled during the period for which reparations were assessed and said that the Board's conclusion that the law was settled by the *Grace Line* cases was a "doubtful assumption." We pointed out that the evidence of factual differences between Flota's situation and that of the *Grace Line* "might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable." We also suggested that the time period of the Flota-Panama Ecuador contract might have seemed to be a reasonable one in light of the *Grace Line* decisions. We noted that Flota had reason to fear liability to Panama Ecuador had it complied with Consolo's demands for space in the absence of a declaratory order by the Board. Finally, we stated that "Flota . . . complained, with some justification, of the two-year delay of the Board in rendering a declaratory order," and that "The result here is that the Board is making Flota pay reparations for the period of the Board's delay." *Supra* at 311, 302 F.2d at 896.

These observations and expressions of opinion on our part were intended to serve as authoritative guidelines for the further deliberations of the Commission, to which we remanded the case for further proceedings not inconsistent with our opinion. We had hoped that further analysis or

¹ The Federal Maritime Board had by then been succeeded by the Federal Maritime Commission. See our earlier opinion: 112 U.S. App. D.C. at 304, n. 1, 302 F. 2d at 889, n. 1.

The Commission's decision here under review is F.M.C. Docket No. 827 (Sub. 1), issued September 18, 1963.

findings by the Commission would throw light on our initial impressions. We were prepared to affirm the Commission if it could establish that the circumstances were such as not to make it unfair to assess damages against Flota.

The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Notwithstanding our conclusion to the contrary, the Commission asserted that the law was not unsettled when Flota executed the contract with Panama Ecuador in May of 1957. Instead of considering whether Flota could in good faith believe that the structural differences in its ships would make a difference to the Board, the Commission asserted: "To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations." The Commission dismissed Flota's filing a petition for declaratory order as a self-serving act made to preserve appearances long after its wrongdoing. The Commission rejected our suggestion that Flota is being made to pay for the Board's own delay. It also rejected our suggestion that Flota might have believed in good faith that its three-year contract with Panama Ecuador would be acceptable to the Board, in view of the 1957 *Grace Line* opinion authorizing a two-year contract. The Commission said "we find it impossible to understand how Flota could have held any such belief."

The reparation provision of the Shipping Act, 46 U.S.C. § 821, is not the ordinary mode for the Commission's regulation of the shipping industry. The grant of reparations is discretionary. This agency, like the Interstate Commerce Commission, has a large range of enforcement pow-

ers to regulate its area of the economy.² If a party has good faith doubts about the applicability of a prior administrative adjudication to it, the party need not be its own judge. It can seek information from the agency about the applicability of the ruling to it. In our prior decision, we noted that "a primary purpose envisaged for it [a declaratory order by the agency] under the Administrative Procedure Act—[is] to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C.A. § 1004(d)." *Supra* at 311, n. 15, 302 F.2d at 896 n. 15. If the course of action a party follows while the administrative determination is pending injures another and enriches itself, reparations to the injured party are frequently allowed. But if the course of action taken does not unduly enrich the party, and the asserted injury to another is only the loss of speculative profits, a real question arises whether reparations should be granted for the period of agency deliberation. Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy in such cases.

We think that an objective and rational examination of all the evidence reveals such equitable factors in this case. It seems clear that Flota entertained serious doubts as to its legal obligations when Panama Ecuador exercised its renewal option in May 1957 and when Flota rejected Consolo's demand for space in August 1957. Flota's petition to the Board for a declaratory order in October 1957 is strong evidence of its good faith. The Commission found that Flota could not have acted in good faith, since its legal

² The reparations and other enforcement sections of the Shipping Act are closely modeled on the Interstate Commerce Act. S. Rep. No. 689, 64th Cong., 1st Sess. 13 (1916). Professors Jaffe and Nathanson note the decreased importance of reparations as an enforcement device in the Interstate Commerce Commission and the declining volume of reparations cases in that agency. JAFFE AND NATHANSON, *ADMINISTRATIVE LAW* 150-51, 389 (2d ed. 1961).

obligations were clear under existing law. We do not agree. We consider Flota's conduct completely consistent with its asserted good faith belief that prior Board decisions did not compel it to break its contract with Panama Ecuador.

The reasonableness of Flota's behavior in 1957 must of course be viewed in the context of the legal situation which it was then confronting. The question facing Flota in May 1957 was not whether to undertake a new contractual obligation with Panama Ecuador, as the Commission implies, but whether to comply with its previously acquired contractual obligation to Panama Ecuador which had perfected its option for a three-year renewal under its 1955 contract with Flota. In 1955, at the time of the original contract, the only relevant Board statement was the 1953 *Grace Line* report. The report found Grace to be a common carrier of bananas and its exclusive contractual undertaking to be an unlawful discrimination, in violation of its statutory duty to apportion its facilities ratably among shippers; but the Board issued no order pursuant to its report. It discontinued the proceedings against Grace, even though Grace did not cancel its future booking contracts. Furthermore, the Board tacitly approved a two-year advance booking contract between Grace and the complainant Consolo despite the fact that the Board's report stated that six months was the "limit of reasonableness" for advance booking. 4 F.M.C. at 304. In short, the Board discontinued its proceeding in the face of an arrangement at odds with the principles laid down in its report. The lack of precedential value of the 1953 *Grace Line* report is suggested by the Board's failure to cite it in its 1957 *Grace Line* decision, which dealt with substantially the same problem, except on a minor point as to the necessity of a tender. Under these circumstances, this report could hardly have been considered an "authoritative pronouncement," in 1955 or in May 1957, when the contract renewal option was exercised.

In deciding whether or not it was obliged to terminate its contract with Panama Ecuador in May 1957, Flota also had before it the Board's report of April 29, 1957, in the *Grace Line* matter, for such guidance as it provided.³ This report, holding that Grace was a common carrier of bananas rested primarily on the unprecedented theory that since bananas were "susceptible to common carriage," they could be carried by a common carrier only under terms of common carriage. Grace had rejected the demands of the two complainant shippers for space; the Board concluded that "the record discloses no convincing [non-discriminatory] reason why any of these parties were denied space." 5 F.M.B. at 284. But the Board held that "in view of the economic problems presented here," a two-year forward-booking system, excluding qualified applicants during the two-year period, was reasonable. It said that Grace must cancel its contracts with existing shippers and offer reefer space under two-year forward-booking arrangements to all qualified shippers. Although an appealable Board decision is valid until reversed, it would be an exaggeration to say that this decision settled the law in the area and provided a reliable foundation on which private parties could confidently plan their actions. The Board's "susceptibility" theory was without precedent; the result was inconsistent with long-standing industry practice; and Grace promptly appealed the decision to the Second Circuit Court of Appeals.⁴

³ 5 F.M.B. 278. This report, issued April 29, 1957, was followed by an order issued August 19, 1957, see 5 F.M.B. 286. In May 1957 there was, of course, the possibility that the Board would not issue an order pursuant to its report, as in the first (1953) *Grace Line* matter.

⁴ The decision was reversed by the Second Circuit and remanded. 263 F. 2d 709. The Board subsequently found Grace to be a common carrier under a different theory, 5 F.M.B. 615 (1959), and the Second Circuit affirmed the decision over a strong dissent, *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (1960).

We are satisfied that Flota, faced with a threatened lawsuit by Panama Ecuador, acted on the basis of reasonable doubts whether its contract with Panama Ecuador was prohibited by the Shipping Act.⁵ Flota's counsel had good grounds to believe that the second *Grace Line* report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract.

First, Flota might reasonably have believed that its situation was factually distinguishable from *Grace's*—that physical differences between Flota's ships and *Grace's* saved Flota's exclusive contract from being held an unreasonable discrimination. The Shipping Act prohibits "unfair or unjustly discriminatory" contracts (46 U.S.C. § 812, Fourth) and the grant of "undue or unreasonable preference or advantage to any particular person" (46 U.S.C. § 815, First). The standard of violation has built into it the concepts of fairness and reasonableness; discrimination and preferences are not per se prohibited. Hence, an agreement that might be unreasonably discriminatory if entered into by one shipping company might be entirely proper, given a different factual setting, for another company. In stressing that the factual issues were crucial to the Board's decision in *Grace Line*, public counsel in his brief in the Flota case noted that the 1957 *Grace Line* decision

"held that the carrier's duties to banana shippers would depend upon the factual circumstances attend-

⁵ Flota's contract with Panama Ecuador contained the following clause:

"If any provision or term hereof be invalid or unenforceable for any reason, Grancolombiana [Flota] shall have the right to terminate this contract by giving seven (7) days' written notice of termination to lessee"

Of course, this provision did not relieve Flota of liability to Panama Ecuador if Flota guessed wrong and terminated a contract ultimately found to be valid, and Panama Ecuador had threatened legal action if Flota leased any of its space to Consolo.

ing the loading, transportation, and discharge of the bananas."

The *Grace Line* decision clearly did not settle the matter of the shipping companies' obligations for the entire banana shipping industry.⁶ The physical differences between Flota's and Grace's ships would make it more difficult for multiple shippers to load and stow on Flota's ships and might so disrupt its schedules as to require it to forego the carriage of bananas.⁷ That Flota's contentions in this respect were far from frivolous is evidenced by respondents' justification, given in oral argument, for the Board's delay in acting on Flota's petition for declaratory judgment: "The complexity of the issues raised by Flota before the Board were not capable of resolution overnight; indeed, in reading the Examiner's decision on the violation phase of this proceeding, it goes into great detail over the loading problem and the refrigeration problem . . ."⁸ To suggest now that Flota could not have had a good faith

⁶ The Board held that Grace Line had not presented facts indicating that its discrimination was reasonable. It left open the possibility that, in some future case, another shipping company could show that its exclusive booking contract for the shipment of bananas was reasonable.

⁷ It seems uncontroverted that Grace's vessels had two and three reefer holds each, only two decks in each hold, and permanent compartments, specially designed to carry bananas. Flota's single reefer hold was designed to carry frozen cargo and had, *inter alia*, three decks; no compartments, fewer and smaller side ports; steeper (and hence more difficult to use) exterior and interior ramps; heavy cumbersome hatch plugs; and greater problems of refrigeration, exhaust, opening, closing and leakage of air.

⁸ In its decision, the Commission also justified its delay as necessary because of the "complex and lengthy hearing into the physical characteristics and utilization of its [Flota's] vessels so far as the banana trade was concerned."

belief that these differences were significant,⁹ after lengthy hearings were required by the Board to satisfy itself whether or not they were dispositive, is to ignore substantial justifications for Flota's course of action in May 1957.¹⁰

Besides its grounds for factually distinguishing the 1957 *Grace Line* case, Flota might have thought in good faith that its renewal agreement with Panama Ecuador was permissible within the standards set forth in the *Grace Line* decision. That decision states that once the shipping company has properly entered into a forward-booking agreement with one or more shippers for a reasonable period, qualified shippers who subsequently applied for space "would be foreclosed from any proration in the space until the end of . . . [the] given period." 5 F.M.B. at 285. Flota might reasonably have thought that its contract with Panama Ecuador was such a legitimate forward-booking agreement.

The Board's 1957 report in *Grace Line* stated that the duty to apportion space among several shippers arises

⁹ The Hearing Examiner in the 1957 *Grace Line* case noted that even as to Grace's superior facilities "*Consolo's* Ecuador manager is thoroughly convinced that utter confusion would exist were there a number of shippers of bananas." (Emphasis supplied.) And the Examiner here found that "the problems attendant upon the use of the Flota facilities may be more accentuated than those encountered by the shippers of bananas on the Grace vessels."

¹⁰ It is worth noting that the banana shippers consolidated their shipments under a single operating corporation for purposes of shipping on Flota, after it opened its reefer space for multiple use in June 1959. This development lends credence to Flota's asserted belief that its reefer space was unsuitable for use by several shippers operating independently. Nothing in the 1957 *Grace Line* decision suggests that a shipping company whose ships *cannot*, as a matter of economic fact, be used for shipping by more than one banana shipper, must apportion its space among qualified shippers in the hope that they can arrange to unify their operations.

"where the demand for space exceeds the supply."¹¹ 5 F.M.B. at 284. That report left open the question of what efforts a steamship company must make to interest shippers in its space. It stated that a shipping company must provide "reasonable notice" before entering a forward-booking arrangement.¹² 5 F.M.B. at 286. Flota might reasonably have thought that its actions in 1955 and 1957 satisfied the requirement of providing notice to other shippers. In 1955, just prior to its entering into the basic contract with Panama Ecuador, it advertised for shippers, but received no bids in response to its advertisements. In 1957, prior to Panama Ecuador's exercise of its option, on advice of counsel, Flota considered proposals from other bidders. Pursuant to this policy, Flota gave notice to Consolo on February 26, 1957, advising him to submit a bid for the refrigerated space by a given date. There was nothing in this letter suggesting that Consolo could only bid for Flota's *entire* refrigerated space. Consolo and another bidder bid only for the exclusive use of the entire space.¹³ No bids for less than all the space were received. While the Board could reasonably insist that Flota's obligation was actively to solicit apportioned bid-

¹¹ The Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790, 792 (1960), tacitly recognized the possibility that a carrier may enter into an exclusive contract where "there are no competing shippers for the space granted to a preferred shipper."

¹² The order, issued on August 19, 1957, after the Panama Ecuador renewal had been executed, is more specific. It states that Grace

"shall offer to its present shippers and to all qualified shippers . . . , upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas"
5 F.M.B. 287.

¹³ We have already indicated that Flota incurred no liability for rejecting these bids. See 112 U.S. App. D.C. at 310, 302 F. 2d at 895.

ding rather than merely to accept offers for apportioned space, this issue was certainly not *settled* by either *Grace Line* report.

Furthermore, Flota could reasonably have believed that the three-year period in its contract with Panama Ecuador, made in compliance with its existing contract obligation and formalized after no bids for an allocation of space had been received, was reasonable under Board standards. The agency found it "impossible to understand" that Flota could, in good faith, entertain such a belief. Yet the Board had held Grace's two-year contracts to be of reasonable duration "in view of the economic problems presented here [in Grace's case]." Given Flota's previous unsatisfactory experience in selling its reefer space, compared to the vigorous competition among shippers for Grace's superior facilities, the Board might well have found a three-year period to be permissible in Flota's case.

The above factors, in our view, justify Flota's doubts in May, 1957, as to whether it had a legal obligation to cancel its contract with Panama Ecuador.

On August 23, 1957, Consolo demanded a portion of the space on Flota's vessels, threatening legal action if Flota did not comply with its demands. Panama Ecuador threatened legal action if Flota leased any of its space to Consolo. Contrary to the Commission's assertion, there is no evidence to suggest that Flota was reluctant to repudiate its contract with Panama Ecuador "because it preferred the advantages of its long-term exclusive arrangement." Rather, in the face of pressures from both sides and uncertain as to its legal duty, Flota, on October 1, 1957, requested a ruling from the staff of the Board. Having received no answer to its request, on October 30, 1957, Flota petitioned the Board for a declaratory order. Not until six months had passed—on May 1, 1958—did the Board even assign a docket number to this petition; at that time it consolidated Flota's petition with Consolo's complaint

seeking reparations, notwithstanding Flota's constant attempts to have its petition promptly determined, without introducing the complicated reparation issue.¹⁴ We need not undertake a detailed examination of the specific incidents of delay. Suffice it to point out that the principal reason for much of the further delay until mid-November 1958, when Flota presented its case, was Consolo's insistence on consolidating its reparation claim with Flota's petition. Furthermore, regardless of the cause of the delay, the fact remains that virtually the entire period for which reparations were assessed covered the time when Flota's petition for a declaratory order was pending before the Board. Confronted with a difficult choice on the basis of uncertain law, Flota had sought an administrative determination of its duties as promptly as possible. On the facts of this case, it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion.

Despite these factors indicating the inequity of the assessment of damages against Flota under the circumstances, the Commission nevertheless declared that "Flota . . . is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity." We think, however, that Consolo's position is hardly deserving of greater sympathy than Flota's. In the first place, the only "pecuniary brunt" which he bore was the loss of unrealized profits he might have made had he utilized the space which Flota failed to make available. Although Flota's action deprived Consolo of potential profits, there is no evidence that Flota in any way benefited by its exclusion of Consolo. The damages assessed by the Board are not designed to deprive Flota of illegal profits; indeed,

¹⁴ Subsequently, on November 14, 1958, over a year after Flota first petitioned for a declaratory order, the trial examiner severed the reparation issue. A reparation order did not issue until March 30, 1961.

they bear no relation to the profits Flota did or did not make on its contract with Panama Ecuador. The latter, the party which benefited from the allegedly illegal arrangement to the detriment of Consolo, was not compelled (by the nature of the remedy) to part with its "illegal" profits. In addition, Consolo himself for four years prior to the Board's 1957 *Grace Line* order (effective October 1, 1957), had received the pecuniary benefits of a preferential arrangement with Grace Lines, held to be unlawful. He was never compelled to give up those profits to shippers that had been excluded.

In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act¹⁵ in imposing reparations on petitioner. Accordingly, we reverse the Commission's decision of September 18, 1963, and direct it to vacate its reparation order issued thereunder.¹⁶

So ordered.

¹⁵ 46 U.S.C. § 821.

¹⁶ In view of our disposition of this case it is unnecessary to consider petitioner's objection to the active participation of the Commission's counsel, who had earlier appeared before this court as an adversary, in the formulation and writing of the Commission's remand opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,
PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC.,
INTERVENORS.

No. 16,366

PHILIP R. CONSOLO, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,
FLOTA MERCANTE GRANCOLOMBIANA, S.A., INTERVENOR.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,
PHILIP R. CONSOLO, INTERVENOR.

On Petitions for Review of Orders of the Federal
Maritime Board, now Federal Maritime Commission.

Decided April 26, 1962

Mr. J. Alton Boyer, with whom *Mr. Odell Kominers* was
on the brief, for petitioners in No. 15,330 and No. 16,369

and for intervenor in No. 16,366. *Mr. T. S. L. Perlman* also entered an appearance for petitioner in No. 15,330.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 16,366.

Mr. Thomas D. Wilcox, Attorney, Federal Maritime Commission, with whom *Messrs. James L. Pimper*, General Counsel, Federal Maritime Commission, and *Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, were on the brief, for respondents. *Mr. Edward Aptaker*, Assistant General Counsel, Division of Regulations, Federal Maritime Commission, at the time the brief was filed, was on the brief for respondents in No. 15,330. *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief for respondents in No. 15,330, and also entered an appearance for respondent United States of America in No. 16,366 and No. 16,369. *Mr. Richard A. Solomon*, Attorney, Department of Justice, was on the brief for respondents in No. 16,366 and No. 16,369 and also entered an appearance for respondent United States of America in No. 15,330.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* was on the brief, for intervenor Philip R. Consolo in No. 15,330 and No. 16,369. *Mr. George F. Galland* also entered an appearance for intervenor Philip R. Consolo in No. 15,330 and No. 16,369.

Messrs. Richard W. Kurrus and *James N. Jacobi* were on the brief for intervenor Banana Distributors, Inc., in No. 15,330.

Before **WILBUR K. MILLER**, Chief Judge, and **BAZELON** and **WASHINGTON**, Circuit Judges.

WASHINGTON, Circuit Judge: These cases raise issues concerning the grant of reparations by the Federal Mari-

time Board¹ to Philip R. Consolo, a banana shipper, against Flota Mercante Grancolombiana, S.A. ("Flota"), a steamship company, for Flota's allegedly discriminatory treatment of Consolo, who sought space on Flota's vessels for the shipment of bananas from Ecuador to the United States.

In our case No. 15,330, Flota challenges an order of the Board, dated June 22, 1959, in which the Board found Flota to be a common carrier of bananas between the United States and Ecuador, and to have discriminated against Consolo in the allocation of space, in violation of Sections 14 and 16 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 812, 815 (1958).² In No. 16,369, Flota challenges a later order of the Board, issued March 30, 1961, directing Flota to pay Consolo some \$143,370.98 as reparations for the conduct condemned in the order of June 22, 1959. In No. 16,366, Consolo challenges the award of March 30, 1961, as inadequate.³

I.

We will take up first the issues presented in No. 15,330. The background of the controversy may be briefly stated. The Grace Line, another steamship company, offered a

¹ The Federal Maritime Board has recently been succeeded by the Federal Maritime Commission. See Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315. Most of the references in this opinion will be to the Board, but this should be considered as including the Commission, where appropriate.

² No. 15,330 was originally held in abeyance pending the outcome of *Grace Lines, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), a similar case.

³ Flota is petitioner in No. 16,369, as well as in No. 15,330, and intervenor in No. 16,366. Consolo is petitioner in No. 16,366, and intervenor in No. 15,330. Banana Distributors, an independent importer of bananas which is in substantially the same position as Consolo, is also an intervenor in No. 15,330.

year-round regularly-scheduled weekly service to North Atlantic ports with vessels containing refrigerated ("reefer") cargo space suitable for carrying bananas. Flota offered a generally similar service. In a proceeding against the Grace Line, the Maritime Board ruled that under the Shipping Act that line was a common carrier, and must offer refrigerated space to all qualified banana shippers. *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615 (1959), aff'd sub nom. *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961); see also *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953). Since that ruling, Grace has carried bananas for a number of shippers. Flota, however, has carried bananas since 1950 under special contracts giving the contracting shippers the exclusive use of Flota's refrigerated facilities. In August 1957, following the Board's first decision in the *Grace* cases, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space. This was refused. On October 30, 1957, Flota filed a petition with the Board for a declaratory order determining whether or not Flota was required to cancel its existing contracts for banana shipment. On November 15, 1957, Consolo filed his complaint. *Banana Distributors*, a banana shipper similarly situated, filed its complaint thereafter. The three proceedings—the petition for a declaratory order and the two complaints—were consolidated for hearing.

At an early stage, the Examiner ruled that he would defer the taking of evidence on the measure of reparation due the complainants until after the merits of the complaints were decided. The merits were determined in Consolo's favor by order of the Board dated June 22, 1959, and it is this order which Flota seeks to have reviewed in No. 15,330. At a proceeding commenced after the decision on the merits, evidence of damages was taken, and the Board entered a Report and Order on March 28, 1961, directing Flota to pay Consolo \$143,370.98 in reparations.

The threshold question in No. 15,330 is whether the Board could properly find, as it did, that Flota violated Section 14 Fourth and Section 16 First of the Shipping Act of 1916.⁴ Flota argues that the issue whether it had violated these sections of the Act was not properly before the Board when the latter rendered its Report and Order of June 1959. The Board's Examiner had ruled, as we have seen, that the proceeding would be heard in two phases. In essence, Flota contends that the first phase was concerned only with the question whether or not Flota was a common carrier of bananas, and that all remaining issues, including the crucial question whether Flota was in violation of the Shipping Act, were reserved for the sub-

⁴ Section 14 of the Shipping Act of 1916, 46 U.S.C. § 812, provides in part as follows:

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

• • • • •

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage"

Section 16 of the Act, 46 U.S.C. § 815, provides in part:

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

sequent proceeding.⁵ As a corollary, Flota claims that in the first proceeding it was deprived of a proper hearing on the question of violation of the Act because it put on complete testimony only with respect to the common carrier issue.

The literal language used in making, and granting, the motion for a severance of the hearing can probably be read in such a way as to lend some support to Flota's contention. Thus, counsel for Banana Distributors, in moving to sever, said "we would like an immediate decision . . . on the question of whether or not the Grancolombiana Line is a common carrier" and "if the Grancolombiana Line is found not to be a common carrier, that would end the case." The Board explains this language by saying that the term "common carrier issue" was a kind of oral shorthand for the concept of violation of Flota's duties as a common carrier under the Shipping Act.

Be that as it may, a careful reading of the record leads us to the conclusion that the only matter removed from the first proceeding was the question of the quantum of damages, not the issue of violation of the Shipping Act. Such in our view must or should have been the understanding of all parties, including Flota. In granting the motion to sever, the Examiner stated: "We ought to proceed with the merits." It is difficult to imagine the "merits" as excluding the issue of whether Flota had violated the Act. And in requesting separation, counsel for Banana Distributors spoke only of "our damage case" and "the damage part of this proceeding" as belonging in the second stage of the hearings. Moreover, counsel described the

⁵ Consolo argues that Flota is making this argument for the first time before this court. But in its Request for Oral Argument and Exceptions to the Examiner's recommendation, Flota said: "5—Flota excepts to the finding that it violated Sections 14 Fourth and 16 First of the Act on the further ground that such a finding was without the scope of the proceedings."

motion to sever as "a severance of the proceeding just like was done in the Grace Line case." It seems to us that the parties must have understood this as a reference to the closely similar and very recent *Grace* case, in which the common carrier and violation issues were treated together.⁶ Similarly, in two earlier Board cases which involved separated proceedings only the question of the extent of the damages was left to the second hearings. See *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffartsgesellschaft*, 1 U.S.M.C. 686 (1937), 2 U.S.M.C. 62 (1939), *aff'd*, 116 F.2d 849 (2d Cir. 1941); *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131 (1949).⁷

In moving for a severance, counsel for Banana Distributors clearly informed the Examiner and other counsel that his purpose was to "get on the Grancolombiana Line ships as promptly as possible." Given that purpose, it would have been pointless to restrict the case to the sole inquiry whether petitioner was a common carrier. For even if Flota were found to be a common carrier, this in itself would not get Consolo on Flota's boats if Flota's denial of space to Consolo was not an "unjust" or "unreasonable" discrimination.

Our conclusion that Flota should have known that the question of its violation of the Act was in issue is borne out

⁶ Numerous statements by counsel for Flota throughout the proceedings unmistakably indicate that Flota understood "the Grace Line case" to be the 1959-60 litigation. Questions of statutory violation were treated in the first half of the Grace proceeding, and were reviewed—and the Board ultimately affirmed—by the Court of Appeals for the Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (1960), while the issue of the quantum of reparation had been deferred for further Board proceedings.

⁷ It may be noted that the Shipping Act itself, at Sections 29 and 30, recognizes a distinction between Board orders requiring the payment of money and other orders. See 46 U.S.C. §§ 828, 829 (1958); 46 C.F.R. § 201.251 (1958).

by indications that Flota did in fact know this. In its own brief to the Examiner, Flota recognized that the legality of its conduct was in question. It argued that "denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors." It concluded its brief by arguing that its contracts "do not violate Section 16, First or Section 14, Fourth of the Shipping Act, 1916."

Finally, in its presentation of evidence and argument below, Flota went far beyond the "common carrier" question. It contended before the Examiner that even if it was a common carrier, it could not as a practical matter offer its refrigerated space on a non-discriminatory basis. It also argued that complainants had not shown that they were prejudiced or unjustly discriminated against because, according to petitioner, they had failed to show that they were competitors of Panama Ecuador, the favored shipper. Flota's presentation of its case in the first phase of the hearing is inconsistent with the position it now advances.⁸ We conclude that the Board properly had before it the issue whether Flota had violated the Shipping Act.

We turn to the Board's findings that Flota was a common carrier, and that it had violated Section 14 Fourth and

⁸ At no point in the first hearing was Flota prevented from putting on any evidence it desired relevant to the issue of violation of the Act. Not until its reply brief before this court did Flota seek to explain with any degree of specificity what facts it would have offered that it did not actually present in the first hearing. Flota argues that if it had known that the question of its violation of the Act was in issue in the first proceeding, it would have then put on certain evidence which it actually put on only in the reparations hearing. The evidence referred to in Flota's reply brief primarily goes to support Flota's contention that Consolo really did not need reefer space on Flota's vessels. This may be relevant to show mitigation of damages. But it would be of doubtful value in justifying Flota's discriminatory refusal to carry bananas for anyone other than the favored shipper. Flota has at no time suggested that it has any other evidence available.

Section 16 First of the Shipping Act. Flota argues that it was not a common carrier of bananas. But Flota as to most commodities is admittedly a common carrier by water, and maintains a regularly scheduled and advertised cargo service between the west coast of South America and various ports in the United States. With the sole exception of bananas, which Flota regularly carries on the same vessels as other goods, Flota has carried cargo without discrimination, and without asserting a right to pick and choose among qualified shippers. But Flota charges the Board with error because the Board should have made "a finding as to petitioner's status in the carriage of bananas, without regard to its status in the carriage of other commodities not employing its reefer facilities." However, this precise argument was rejected in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960)—a decision with which we agree.⁹ Flota began its defense before the Board by "assuming that the Grace Line decision [of the Board] is good, valid law, and we are not attacking that in any manner, shape or form." Flota sought to avoid the effect of the *Grace Line* cases by showing that Flota's operations and vessels were substantially different from those of the Grace Line. The Examiner and the Board took extensive evidence and considered this question at great length. The Board concluded: "The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. . . . Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unrea-

⁹ Judge Hand went even further than it is necessary for us to go in this case. He indicated that a company's "status in the carriage of other commodities" was not only relevant, but might be determinative. "[T]here is every reason of declared policy to assume that the term [common carrier] was used to include all those who were to some degree 'common carriers.'" 280 F. 2d at 792. Cf. *Louisville & Nashville R. Co. v. United States*, 282 U.S. 740 (1931); *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 at 300.

sonable." 5 F.M.B. at 639. We believe this finding by the Board to be adequately supported by the record.

Finally, Flota contends that the Board did not consider the reasonableness of Flota's actions, did not make a finding with respect thereto, and could not on the record have found that Flota acted "unjustly" or "unreasonably." But the Board's report said in explicit terms "We find no justification for this conduct on the part of Flota" As we have pointed out, the Board rejected Flota's argument that structural differences between Flota's ships and Grace's justified Flota's discrimination. It also rejected Flota's attempted justification based on vessel scheduling and shipper convenience. It ordered that space be made available to shippers on a "fair and reasonable basis." It noted that an appropriate forward-booking system would be just and reasonable, "as opposed to 'unjust' and 'unreasonable' which aptly describes the present system." Under the circumstances, we think it beyond question that the Board considered and made sufficient findings as to the reasonableness of Flota's conduct.

The Board's findings are supported by the record. Flota argues that it acted reasonably in refusing space to Consolo because Flota already had an exclusive contract with another shipper, Panama Ecuador, and because it sought to ascertain the legality of its conduct by petitioning the Board for a declaratory order. But the making and performance of the exclusive contract comprised the very conduct which constituted violation of the Act. Flota discriminated by favoring Panama Ecuador over Consolo—just as in the *Grace Line* case the carrier had made special contracts with favored shippers and had declined to serve others. Nor does Flota's action in petitioning for a declaratory order automatically excuse what would otherwise be a violation of the Act. Allowing the Board that measure of discretion due to it because of its expertise and status as an administrative agency, we think

it was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just.

The Board's order of June 22, 1959, challenged in No. 15,330, will accordingly be affirmed.

II.

We turn now to the petitions in No. 16,366 and No. 16,369, dealing with the question of reparations.

Jurisdiction. Consolo has moved to dismiss Flota's petition in No. 16,369 for lack of jurisdiction, urging that this court cannot review orders awarding reparations, on petition of the party charged. Flota and the Board resist the motion, alleging that this court possesses jurisdiction to entertain the petition under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C. § 1031 *et seq.* The Hobbs Act gives the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. § 830. Section 31 in turn provides that the venue and procedure in suits to enforce, suspend, or set aside any order of the Federal Maritime Board shall, "except as otherwise provided," be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The relevant statutory provisions regarding I.C.C. orders are contained in 28 U.S.C. §§ 1336, 2321-25. Section 1336 states:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Since Section 1336 gives the District Courts broad jurisdiction to "set aside" I.C.C. orders, and the procedure for

Federal Maritime Board cases is similar by virtue of Section 31, the jurisdiction to set aside final orders of the Federal Maritime Board formerly possessed by the District Court under Section 31 of the Shipping Act appears to have been transferred to this court by the Hobbs Act.¹⁰

Our jurisdiction to review No. 16,366, in which Consolo attacks the reparations granted as inadequate, was not challenged. We agree that the case is properly here. Cf. *D. L. Piazza Co. v. West Coast Line*, 210 F.2d 947 (2d Cir.), cert. denied, 348 U.S. 839 (1954). If we are obliged to review the order at the complainant's instance, it would be anomalous if we could not review it at the instance of the party it holds liable. Once here, the order should be reviewable in its entirety, and the rights of all parties considered. Cf. *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939).

We are well aware, however, that the jurisdictional problems in these cases are not free from doubt and difficulty. The Hobbs Act and Section 31 of the Shipping Act do not in terms purport to give us authority to render a money judgment based on a Board order awarding reparations, or to enforce any order of the Board. If a carrier chooses not to obey an order of the Board for payment of

¹⁰ Sections 2321-25 of Title 28 of the Code (formerly contained in the Urgent Deficiencies Act), and a number of cases cited by Consolo, such as *Brady v. Interstate Commerce Commission*, 43 F.2d 847, 852 (N.D. W. Va. 1930), *aff'd per curiam on other grounds*, 283 U.S. 804 (1931), deal largely with the procedural question whether a reparations order of the Interstate Commerce Commission is reviewable by a three-judge district court or a single judge court. Cf. *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949). Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders. We note, also, that Section 31 specifically refers to suits to "enforce, suspend, or set aside" Board orders; the Hobbs Act adds to this by including suits to determine the validity of such orders, but subtracts from it by omitting any reference to their enforcement.

reparations, even after affirmance by this court, it may be that to obtain enforcement the complainant would be forced to go into the District Court in a suit under Section 30 of the Shipping Act, 46 U.S.C. § 829. The defendant in such a Section 30 suit would be free to demand a jury trial and to introduce evidence not previously before the Board. In the trial the order and findings of the Board would, by the terms of the statute, be given only prima facie effect. The ultimate result reached in the District Court might vary considerably from the Board's order.¹¹ Conceivably, a jury might find the carrier to be free of any liability whatever. And any final judgment rendered could be appealed to the appropriate court of appeals, which might not be the same one which had reviewed the order in the first instance. A strong argument can be made that only one review should be permitted, and that we should not undertake to review the Board's reparations order at the present stage, in any respect. We have considered these difficulties in reaching our conclusion. But we think it clear that Congress intended, in the Hobbs Act, to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. 3 (1950); cf. *Pennsylvania R. Co. v. United States*, 363 U.S. 202 (1960); *D. L. Piazza Co. v. West Coast Line, Inc.*, *supra*. We think that Congress intended us to review reparations orders, at least to the extent necessary "to determine the validity"

¹¹ We do not, of course, wish to minimize the res judicata effect of our decision. See *In re Federal Water & Gas Corp.*, 188 F. 2d 100 (3d Cir. 1951), *cert. denied sub nom. Chenery Corp. v. Securities and Exchange Commission*, 341 U.S. 953 (1951). Our determination of the issues dealt with in No. 15,330, for example—such as the issue as to whether or not Flota violated the Act—is undoubtedly binding on Flota and the other parties. Flota chose to come to this court—it cannot reject our decision.

of such orders on appropriate petition, and that it is our duty to do so.

The scope of our review in Nos. 16,369 and 16,366 also presents difficulties. Questions of law, such as matters of jurisdiction and fair administrative procedure, are obviously for our determination. Cf. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547 (1912). But in reviewing the evidence, we are confined to a much more restricted standard, as the Administrative Procedure Act, §§ 1 et seq., 5 U.S.C. §§ 1001 et seq. (1958), and a long line of Supreme Court decisions, clearly indicate. See, e.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942). We have examined the appeals from the reparations award with these considerations in mind.

The Merits. In No. 16,366, Consolo seeks additional reparations. He questions the Board's denial of pre-judgment interest. But the cases cited by Consolo, such as *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925), only demonstrate that recovery of interest is not barred, not that the granting of interest is mandatory. We find that the Board did not abuse its discretion in denying interest. Cf. *Dorsett v. Shore*, 254 F.2d 373, 377 (4th Cir. 1957); *Miller v. Robertson*, 266 U.S. 243 (1924); *Board of County Comm'rs of the County of Jackson v. United States*, 208 U.S. 343 (1939).¹² Consolo also claims reparations from the time he first demanded space. The Board calculated the reparations from the time Consolo first demanded an *allotment* of space. Prior to that time, he was unsuccessfully bidding for an exclusive patronage contract for Flota's entire reefer space. This is exactly the kind of exclusive contract which Con-

¹² For similar reasons we, reject Flota's argument that the Board's award of interest on "amounts unpaid after 60 days," from March 30, 1961, was erroneous.

solo now claims was illegal and damaging to him. Under these circumstances, we think the Board was reasonable in declining to begin the reparations period at an earlier date than the time Consolo first attempted to secure a fair and equitable portion of space. Finally, Consolo, like Flota, is dissatisfied with the 18.46% of the total computed net profit awarded to Consolo. Flota says Consolo should only have received 15.58% since this is the only amount of space *it says* it would have given him. Consolo wants 33 $\frac{1}{3}$ %, arguing that there were only three qualified shippers during the reparation period, and hence he should have been allocated one-third of Flota's banana space. Yet it hardly seems reasonable to say that all qualified shippers must be given equal space, regardless of the applicant's size, facilities, financial position, and ability to arrange for the loading and discharging of the cargo. The Board's selection of 18.46% was based on an allotment to and use by Consolo of that percentage of the cubic capacity of Flota's ships on the United States Atlantic run in actual practice over a period of time. Perhaps the Board might have chosen a better yardstick. Perhaps not. We are surely unable, however, to say that the Board's choice was arbitrary or unreasonable. We therefore find no merit in Consolo's petition in No. 16,366.

In No. 16,369, Flota seeks to avoid the payment of reparations primarily by arguing that it did not violate the Shipping Act. To the extent that a number of its contentions in this regard have already been dealt with in our consideration of No. 15,330, we will not repeat them here.

Flota makes a number of additional arguments.¹³ It first claims that there was no proof or finding of actual

¹³ Flota also argued that the Board misconstrued its function vis-a-vis the Examiner. The statement of the Board upon which this connection is based has been taken out of context as quoted in Flota's brief. Neither other statements by the Board nor its actions will support Flota's claim in this regard. The argument that Consolo's claim for reparation was untimely is similarly without merit.

competition between Consolo and Panama Ecuador. But though the express words "we find competition existed" are not employed, the entire decision of the Board is implicit with the finding of such competition. For example, the Board repeatedly refers to the fact that "Panama Ecuador, in receiving and using that space [of Flota], was favored and advantaged." 5 F.M.B. 638-39. And the Board explicitly speaks of Flota denying space "to a qualified competitor." 5 F.M.B. 639. In context, the word "competitor" clearly refers to Consolo, in relation to Panama Ecuador.¹⁴ Moreover, granting to the Board the right to draw reasonable inferences, we believe that there is sufficient evidence in the record to support a finding of competition, especially since Consolo and Panama Ecuador were both dealing in exactly the same commodity at the same time, were both "independents," and both shipped extensively to many of the same seaports.

One of Flota's principal arguments, however, was and is that the Board erred in failing to hold that it would be inequitable to award reparations to Consolo. Flota marshaled substantial evidence in support of its contention. It pointed to the unsettled nature of the law in the field, as illustrated by the fact that the Second Circuit in the first *Grace Line* case reversed the Board's order and remanded it, concluding that the legal theory adopted by the Board was erroneous. 263 F.2d 709 at 711. In the second case (which was not decided until July 1960), the majority agreed with the Board's new approach to the case, but Judge Moore filed a strong dissent, 280 F.2d 790. At the hearing in this case, Flota advanced evidence of factual differences between its situation and that of the *Grace Line*. While this would not necessarily justify Flota's conduct, it might well lead to the conclusion that

¹⁴ The Board also noted Flota's exception No. 16 to the Examiner's failure to make a finding of competition between Consolo and Panama Ecuador. The Board found that "the 16th exception is unsupported by the record."

Flota in good faith believed that the *Grace Line* case was distinguishable. Flota also complained, with some justification, of the two-year delay of the Board in rendering a declaratory order.¹⁵ Moreover, Flota already had signed an exclusive contract with Panama Ecuador covering what may well have seemed to be, in the light of the Board's decision in the *Banana Distributors* cases, 5 F.M.B. 278 (1957), and 5 F.M.B. 615 (1959), a reasonable period of time. By granting space to Consolo and other shippers when first requested, Flota might have opened itself to possible liability for breach of the contract with Panama Ecuador, at least in the absence of a declaratory order from the Board. Finally, Flota pointed out the difficulties and delays in loading which would result if more than one shipper were to use Flota's refrigerated space, and Consolo's apparent failure to utilize all of the space available to him on Grace Line vessels. The Board took up most of these points individually and disposed of them briefly.¹⁶ But the essence of Flota's argument was that the cumulative weight of all the circumstances, and not

¹⁵ Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C. § 1004(d) (1958). The result here is that the Board is making Flota pay reparations for the period of the Board's delay.

¹⁶ The Board's holdings as to its delay in rendering a declaratory order, and as to the Panama Ecuador contract, were in effect conclusory rejections of Flota's arguments. The Board answered Flota's contention that the law was unsettled by assuming that the law was settled by the Grace Line cases, a doubtful assumption at that stage. Finally, the Board felt that the operational difficulties of multiple loadings could be overcome by "the ingenuity of practical men." But Flota suggests that later events have shown that the Board was mistaken.

any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider, in light of the Board's decision and the damages it imposed, that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act,¹⁷ or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.¹⁸ In any case, we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.¹⁹

The Board's order of June 22, 1959, challenged in No. 15,330, is affirmed; the order of March 30, 1961, challenged in Nos. 16,366 and 16,369, is set aside, and the matter remanded to the agency for further proceedings not inconsistent with this opinion.

So ordered.

¹⁷ Section 22 of the Shipping Act provides only that the Board "may" direct the payment of reparation. 46 U.S.C. § 821 (1958).

¹⁸ We have concluded that the Board could properly find after the first hearing that Flota had violated the Act. But this does not mean that the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed.

¹⁹ Our disposition of the case makes it unnecessary for us, at least at this time, to consider the remaining issues raised on this appeal. Thus, should the Board decide, on remand, that a different measure of reparations is warranted, Flota's arguments as to the calculation of damages might be rendered moot.

APPENDIX D

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Submitted January 25, 1961

Decided March 28, 1961

Complaint found injured to the extent of \$143,370.98 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas from Ecuador to North Atlantic ports of the United States, and reparation in such amount is awarded.

Robert N. Kharasch and *William J. Lippman* for complainant, Philip R. Consolo.

Odell Kominers, *Renato C. Giallorenzi* and *John H. Dougherty* for respondent, Flota Mercante Grancolombiana, S. A.

Report of the Board

Thomas E. Stakem, Chairman; Sigfrid B. Unander, Vice Chairman; Ralph E. Wilson, Member

By the Board.

I. Proceedings

By an order on June 22, 1959 the Board ordered that the proceeding docketed as No. 827 be held open for further proceedings on the claim of complainant, Philip R. Consolo (Consolo), for reparations, if any, (5 F.M.B. 633, 641) pursuant to Sec. 22 of the Shipping Act, 1916, as amended, (Act). The present proceedings are in response to a complaint to Docket No. 827 filed November 15, 1957 by Consolo requesting an order by the Board ordering Flota Mercante Grancolombiana, S. A. (Flota) to pay reparation for damages during the period November 4, 1955 through November 4, 1957 in the amount of \$600,000. and other relief and to a supplemental complaint filed November 18, 1959 (Docket No. 827, sub. No. 1) by Consolo requesting an order by the Board ordering Flota to pay reparation for damages during the period November 15, 1957 through September 1, 1959, in the sum of \$250,000. and for other relief.

By its report and order of June 22, 1959, served July 2, 1959, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S. A.*, 5 F.M.B. 633 (1959) the Board found Flota to be a common carrier by water in the operation of ships between the west coast ports of South America and United States Atlantic ports and found Flota's practice of contracting all of its refrigerated space on its ships operating between Ecuador and ports on the North Atlantic coast of the United States to a single shipper to be unjustly discriminatory and unreasonably prejudicial in violation of the Act.

The further proceedings and hearing on the claim for reparations were had by an examiner who, on October 5, 1960, submitted a recommended decision that reparations were due in the amount of \$259,812.26. Exceptions and replies thereto were filed. Oral argument before the Board was held on January 25, 1961.

II. Facts

Consolo, an experienced and qualified shipper of bananas for many years between Ecuador and the United States was found to have proven his complaint that Flota's practice of excluding him was in violation of Secs. 14 and 16 of the Act. The Board's findings of fact, conclusions, decision and order on this phase of the proceedings were entered of record and reported in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S. A.* (Supra).

In its report the Board found that Flota in the operation of its freight ships between Ecuador and the U. S. North Atlantic ports and U. S. Gulf of Mexico ports is a common carrier by water in the foreign commerce of the U. S. (page 638). No date was established for the beginning of such status, but Flota was shown to have operated since July 20, 1955 between Ecuador and the U. S. on an approximately weekly schedule with 5 ships and that it now operates 6 ships. Consolo did not use any of these ships until September 1, 1959.

Consolo first expressed an interest in space in the Spring of 1955 when he had a conference with Flota officers and "made inquiry as to the height of each chamber [for banana storage] and then the rate they were asking for the ships". He inspected a ship later and found fault with the height of the storage chamber. Consolo was given figures as to what Flota "wanted for the ships in its entirety" (sic) but he asked for a reduced rate on the lower chamber or for the two upper chambers at the proposed rates. The counter offers were rejected. Other negotiations, for a contract by correspondence and by conversations in 1956 and 1957, did not result in a mutually acceptable arrangement. At no time before August 23, 1957 did Consolo ask for an allotment of space at a regular tariff rate, but accepted the prevalent trade custom of either bidding or negotiating for space on a contractual basis.

Consolo proved that he could have bought and sold 5,000 to 15,000 additional stems of bananas if Flota had allotted him space.

By a letter dated August 23, 1957 addressed to Flota at Bogata, Colombia, Consolo wrote asking "to be considered for a fair and reasonable amount" of space on Flota's ships. The letter referred to our dockets Nos. 771 and 775 as the basis for this request. Flota's reply dated October 7, 1957 was that "reefer space on our vessels has been committed for the next two years".

By its order of June 22, 1959, served July 2, 1959 the Board ordered Flota to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916 as amended, not later than August 1, 1959". Respondent was also ordered to offer, within 10 days after July 2, 1959, all qualified banana shippers refrigerated space for the carriage of bananas. No proofs were introduced in the present proceeding to show how this order was complied with. An allotment of space was made by Flota September 1, 1959 when Consolo was one of five qualified shippers who applied for and were allotted space.

III. Discussion

Sec. 22 of the Act authorizes any person to file a sworn complaint "asking reparation for the injury, if any," caused by any violation of the Act. Exclusion of complainant, Consolo, from the use of Flota's common carrier service from Ecuador has been found to be a violation of the Act. Consolo filed a sworn complaint asking for reparations. An examiner conducted proceedings in which the issues were limited to ascertaining the period of injury and the computation of the amount due as damages for injury. The examiner recommended that complainant is entitled

to reparation in the amount of \$259,812.56 based on 105 voyages during the period August 23, 1957 to September 1, 1959, yielding a net profit of \$779,436.78 of which Consolo was entitled to one-third.

In interpreting Sec. 22 in *R. Hernandez v. A. Bernstein Schiffahrtsgesellschaft* 1 U.S.M.C. 686 (1937) the U.S. Maritime Commission held that defendants unjustly discriminated against complainant in violation of paragraph Fourth of Sec. 14 of the Act by refusing to book cargo in response to applications by complainants for the transportation of automobiles. Complainant was shown to have exported unboxed automobiles by securing steamship booking and then purchasing the automobiles therefor. Complainant was also shown to have the ability to obtain automobiles for shipment. In some cases complainant also had small lots of automobiles available in New York ready to ship to Bilbao, Spain before booking. Defendants were shown to have held themselves out as common carriers of unboxed automobiles from New York to Bilbao. Their ships were constructed to accommodate automobiles and capacity was available. The number of automobiles required to fulfill complainant's contract to sell to a dealer in Spain was shown. Complainant proved a loss of 15% profit on prospective shipments. Proximate injury was held to have been caused complainant because of his inability to supply automobiles pursuant to an agreement with the importer in Spain. The case was assigned further hearing to determine the amount of reparations due, in the absence of evidence (1) that all of the cars upon which reparation was based could have been carried by defendants, (2) as to the amount of space which was available and, (3) as to the value of the cars which could have been carried in such available space.

In *Roberto Hernandez, Inc. v. Arnold Bernstein, S., M.B.H.* 2 U.S.M.C. 62 (1939) the above elements were proven and reparations equal to the estimated net profits

that would have been earned during the reparations period were established.

The defendants having failed to comply with the order, the appellant brought suit for enforcement pursuant to Sec. 30 of the Act. The defendants resisted enforcement on the ground that (1) there was no basis for the plaintiff's claim and (2), it was plaintiff's duty to mitigate any damages. The District Court agreed in *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 31 F. Supp. 76 (D.C. N.Y. 1940), but on appeal Circuit Court, reversed in 116 F. 2d 849 (C.C.A. 2d, 1941) stating that the District Court raised too high a standard on which to test the proof as to damages as found by the Commission. The Court held that where the Commission's findings "are supported by substantial evidence . . . and where no new evidence on the subject is introduced . . . it is the duty of the court to accept and give them effect". The duty of the court is equally that of the Board. The basis for plaintiff's claim was found to exist and the Court stated that the "burden to show a failure to mitigate the damages was upon the defendants".

In the reparation hearing in *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248 (1950), the Board found that the complainants had not sustained the burden of proof because of want of proof on "cost, outturn and selling price" but in so holding acknowledged that damages are to be based on the difference between cost and selling price, where there was a refusal to furnish refrigerated space to the complaining fruit shippers.

The Supreme Court has held that ordinarily "the measure of damages in such case [refusal to carry] is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage." *New Mexico ex. rel. McLean & Co. v. Denver & R.G.R. Co.*, 203 U.S. 38, 27 S. Ct. 1, 3 (1906). In accord are 9 Am. Jur. Carriers, § 314, 3 Hutchinson on

Carriers (3rd Ed.) §§ 1359, 1370, 2 Moore on Carriers § 609, 13 C.J.S. Carriers, § 33, and see *Sonken-Galamba Corp. v. Atchinson, T. & S.F. Ry Co.*, 124 F. 2d 952, 958 (C.C.A. 8th, 1942).

In the present case proof of damages meeting the specific standards of cost, outturn and selling price was offered in detail. Witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States. Consolo was shown to have the resources to buy and ship bananas. The loading sheets showing actual purchases and the outturn sheets showing actual sales and "liquidation sheets" (report of commission merchant to importer showing proceeds of sale, expenses, commission and net proceeds) were used, for each shipment of bananas by Consolo on Grace Line ships during the reparation period. The space that would have been used on Flota ships at Flota's freight rates during the reparation period was shown. Costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week. Freight charges were supplied from Flota's records of actual freight collected on its voyages during the reparation period. Stevedoring costs came from testimony of banana shippers as to actual cost at New York. We find the figures used in the reparation computation to be fully supported in the record. The computation itself, using the above data, established a dollar figure for profit or loss per banana stem shipped before stevedoring and freight. From the amount of profit per voyage the freight stevedoring and incidental administrative overhead and other expenses have been deducted. The examiner's conclusions were based on these fully documented facts.

Consolo excepted to the examiner's recommendation that the reparation period did not begin until August 23, 1957 and to the failure to recommend that Consolo be awarded reparation for the period November 15, 1955 through September 1959 inclusive. Consolo also excepted to an error

in computing damages within the period August 23, 1957 to September 1, 1959 on the ground that the deduction from profit for stevedoring costs should be the cost for stevedoring in Philadelphia instead of New York. The New York costs were shown to be 48.8 cents per stem whereas the actual Philadelphia costs were later shown to be 35.15 cents per stem.

Flota excepted to the following:

1. The Examiner's ultimate recommendation.

2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.

3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on reparations, and in the present brief; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provision of the Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo

during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other available transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, listing certain findings of fact.

15. The Examiner's failure to find that the renewal of Panama Ecuador's (Panama-Ecuador Shipping Corporation, exclusive shipper on Flota's ships) contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case; (*Banana Distributors, Inc. v. Grace Line Inc.* 5 F.M.B. 278 (1957)).

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador.

17. The method of ascertaining damages employed by the Examiner.

18. The Examiner's failure to make subsidiary findings as to the components of the recommended \$259,812.26 reparations.

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota in its opening brief on reparations.

The arguments supporting the exceptions are essentially (1) that the Board did not, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana* (supra), find Flota guilty of violating the Act before June 22, 1959; (2) that in contracting all of its refrigerated space for bananas to a single shipper before then Flota acted legally, (3) that the failure of the Board or the Board's staff, prior to June 22, 1959, to give Flota a legal opinion, in response to a petition for declaratory relief, as to the validity of Flota's exclusive patronage contract prevents the Board from considering Flota as having acted wrongfully; (4) that the complaint and request for the losses are speculative, the claim for reparation is not bona fide, and the burden of proving loss has not been sustained; and, (5) the damages were incorrectly measured and computed and interest should not be added.

For the reasons given below, we agree in part only with the respondent's exceptions as to the computation of reparations and to the award of interest on reparations. The remaining exceptions are rejected. Exceptions and proposed findings not discussed in this report nor reflected in our finding have been considered and found not justified.

The 1st and 13th exceptions refer to the award of interest on reparations. We find that it would be inequitable to

award interest on an unliquidated claim before it was due and disallow any interest on the award herein.

In exception 2 respondent argues that it acted reasonably and did not unjustly, unfairly or unreasonably discriminate against Consolo and therefore did not violate any statute during the period before the Board's order of June 22, 1959. In exception 3 the incompleteness of the findings is averred and in exception 4 failure to find inequity in an award is excepted to. Our report in 5 F.M.B. 633 has already held that in the past "Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." (639). The facts and circumstances omitted all relate to more arguments that Flota did not violate the Act before June 22, 1959. Such facts and the issues they raise have already been considered and decided in the first proceeding and are not appropriate subjects for exceptions in the reparations phase of this docket. The examiner properly did not review these facts nor retry the issues they raise. The previous report on these issues is plain and is final as far as the Board is concerned. The only remaining issue was the measure of the reparation Consolo is entitled to under Sec. 22 of the Act. Facts bearing on this issue alone were all the examiner was required to consider.

The exceptions are also based on the argument that because Flota had contracted all of its space to another single shipper during the period involved reparations would be inequitable and unjust and the inclusion of voyages before June 22, 1959, when the favored shipper's contract was still being performed, was not proper. This argument, too, uses the erroneous premise that performance of the exclusive patronage contract, during a time when Flota unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable preference or advantage to particular persons, was a valid excuse for non-performance of obligations under Secs. 14 and 16 of the Act. The performance of the contract is the very act

which constitutes the violation of such sections. We have held that such conduct was improper in the following words: "It is . . . clear that they (Consolo and Banana Distributors, Inc.) were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, (supra at p. 638). In other words, as long as the contract caused the denial of space there was a violation. The violation did not begin June 22, 1959, but long before this. There can be no question of inequity or unjustness to a respondent who violates the Act by means of an exclusionary contract. It is the excluded shipper who has the equities on his side under the Act, not the favored shipper nor the discriminatory and preference-giving carrier.

One of the arguments advanced to prove absence of fault in failing to offer non-discriminatory and non-preferential service was (1) that Flota had filed a petition for declaratory relief (Docket No. 835, decided in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, 5 F.M.B. 633 (1959)) asking the Board to determine the validity of Flota's contracts and to terminate the uncertainty that had arisen as a result of the conflicting demands upon Flota following the decision in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278 and 5 F.M.B. 615 (1959) and, (2) that the Board failed to make a timely response thereto. It was not incumbent on the Board, however, to give Flota a legal opinion on the effect of its conduct on shippers. The demands were conflicting only to the extent that Flota made them so by continuing to serve favored shippers. The subsequent uncertainty was the consequence of Flota's own position that it could continue to contract refrigerated

space to preferred shippers and to exclude complainants without violating the Act as was contended in *Grace Line v. Federal Maritime Board*, 280 F. 2d 790 (C.C.A. 2d 1960). In *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953) and *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) the Board decided that Grace Line, Inc. was a common carrier by water under sufficiently similar facts as to lead the Board to state in the present case (5 F.M.B. 633) that what we said in the *Banana Distributors* case "is appropriate here, and we feel is dispositive of the issues in this proceeding". Instead of accepting the *Grace Line* cases as providing a rule for its guidance, Flota refused to offer service and litigated the issues relying on "arguments relating to the differences between Flota's vessels and Grace's vessels" (635) to justify such refusal. Flota was eventually found to have violated Secs. 14, Fourth, and 16 of the Act. No delay converted its past violations into lawful conduct and Flota must take the consequences of its refusal, (it became a common carrier in 1955) to take Consolo's cargo after Consolo asked for non-preferential service in 1957. Common carrier status is not created by nor are violations of the Act non-existent until the Board's report is served. Both are brought about by Flota's own actions beginning in 1955.

The 5th exception relates to the inclusion in the reparations calculations, of voyages after June 22, 1959, which is the date our report in No. 827 was "decided". The examiner extended the damage period to September 1, 1959 when Consolo was actually allotted space in response to the Board's order served on July 2, 1959. Respondents were ordered, within 10 days after the date of service of the order, to offer refrigerated space for the carriage of bananas on its ships to all qualified banana shippers. Flota made no offers between June 22 and July 12, 1959, but we have no reason to doubt that Flota would have offered space on July 12 if bananas had been tendered in Guayaquil at that time. None were tendered before then, as far as

this record shows. No shipments were ready until September, but this does not furnish a reason for extending the damage period beyond the date when the Board's order should have been complied with, in the absence of any offer of proof by complainant of a refusal, after July 12, 1959, and in the absence of proof of its own willingness to ship, nor of a tender of cargo. The damage should not be extended to the time when the complainant shipper was ready to provide a cargo, but is limited to voyages departing from Guayaquil through July 12, 1959, the date when compliance should have begun. (Cf. *Swift & Company and Swift and Company Packers v. Gulf and South Atlantic Havana SS Conference et al.*, Docket No. 854 Decided February 2, 1961.

The 6th, 7th and 8th exceptions all concern the proofs of injury offered by complainant and allege a failure to maintain the burden of proof or to show actual damage. The burden of proof was maintained by extensive testimony and exhibits showing availability of bananas, cost, selling price (226 quotations over a period of four years were shown) and freight stevedoring and other expenses as noted above. The actual damages were shown to be proximate result of violations of the statute. *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248, 249 (1950). The losses shown were not speculative, but fairly inferable from the data supplied and testimony of witnesses that complainant would have shipped on Flota ships if he had not been excluded.

The 9th, 10th and 17th exceptions deal with the method of measuring and computing the damages. The examiner began the measure of damages from August 23, 1957 instead of 1955 as claimed. We agree that the examiner's date and with the finding that Consolo's offers and counter-offers for service before then were for contract carriage and not for space on a non-preferential basis. He was not excluded before then because he never sought an allocation

of space on an equal basis with other shippers; rather, Flota's facilities or charges for services were not acceptable to the complainant on complainant's terms. These negotiations may not be translated into requests for a non-preferential allocation of space on a common carrier by water. What Flota refused during this period was the demand for a special contract which would make Consolo a favored shipper too.

The examiner found Consolo entitled to one-third of Flota's space based on the fact that complainant was one of three qualified applicants for space. Other applicants were declared to be unqualified. When space was finally allocated five shippers actually qualified and measured by Flota's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, Consolo of 18.46% of the cubic capacity of Flota's ships on the U.S. Atlantic run. This actual experience with Flota appears to be a just and reasonable guide of what Consolo was entitled to for the purpose of measuring his past damages and it is adopted. Respondent's exception on this point is valid.

The 11th exception is found unsupported.

The 12th exception deals with complainant's failure to minimize damages by using other means of transportation. Once the failure to perform common carrier obligations and exclusion is shown, "the burden to show a failure to mitigate the damages was upon the defendants". *Hernandez v. Bernstein*, 116 F. 2d 849 (C.C.A. 2d 1941) at pp. 851, 852. Flota offered no such proof other than a suggestion that chartered ships might be used, but no suitable ones were shown to be available. Respondents have failed to show any mitigating factors.

Exception 14 relates to the examiner's subsidiary findings of fact on which the award of reparations is based. None is shown to be wrong, all have been fully established in this docket.

The 15th exception likewise assumes the untenable premise that discriminatory and preferential conduct did not exist until after the Board's decision on Consolo's complaint against Flota and that the contract which caused such conduct excused the disregard of statutory obligations.

The 16th exception is unsupported by the record.

The 18th and 19th exceptions relate to the ascertainment of damages. Complainant submitted extensive evidence of lost profits in the form of schedules of about 226 individual voyages between 1955 and 1959 showing for each voyage the number of banana stems actually carried by named ships on specified dates between Guayaquil, Ecuador and Philadelphia, Penna. (with the exception of two ships which discharged at Charleston, S.C. and Baltimore, Md. respectively because of a strike at Philadelphia, Penna.) In the absence of other proven data and of any disproof of the complaint's data or challenge of complaint's figures, such data and figures have been used in the computation of reparations found to be due.

The complaint's profit per stem of bananas is the difference in cost at Guayaquil and the value or sale price at Philadelphia which is taken to be the total gross profit per stem. This amount has been multiplied by the number of stems on each shipment and the products added to get the gross profit. From such total gross profit there has been deducted (1) the total freight cost and (2) the total estimated cost of handling the bananas at Philadelphia. The latter amount is 50.15 cents a stem (35.15¢ for stevedoring, plus 3¢ for overhead, plus 12¢ for insecticides, rope and bags) multiplied by 1,061,286 stems carried during the reparation period. Complainant did not show the 3¢ a stem deduction for overhead in its claim, but this amount was deducted by the examiner with the subsequent admission by the complainant that it was a proper amount. The examiner's computation was also based upon the use of New York instead of Philadelphia stevedoring costs and

omitted the deduction of the estimated incidental costs of handling bananas at Philadelphia in the amount of 12 cents. That latter figure was also furnished by complainant.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959, the use of complainant's statement of profits per voyage totaling \$2,514,236.43 on all voyages allowed, and the subtraction therefrom of total freight in the amount of \$1,204,343.95 and incidental costs in the amount of \$532,234.93, as proven by complainant, we find the remainder is the proper net profit of \$776,657.55. Consolo is entitled to 18.46% of the net profit. An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

THOMAS LISI
Thomas Lisi
Secretary

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 28th day of March, 1961.

No. 868

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its findings of fact, conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is Ordered, That respondent Flota Mercante Gran-colombiana, S.A. be, and it is hereby notified and directed to pay unto complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

THOMAS LISI
Thomas Lisi
Secretary

APPENDIX E

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

On rehearing on remand complainant found injured to the extent of \$106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

Robert N. Kharasch, William H. Lippman and Amy Scupi for complainant. Odell Kominers and J. Alton Boyer for respondent.

Report

By THE COMMISSION (John Harllee, Chairman, Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, Commissioners):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,¹ this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grandcolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

¹ *Flota Mercante Grandcolombiana, S.A., et al. v. F.M.B. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

On June 22, 1959, the Board in Dockets 827, 835 and 841² found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under reconsideration, in the amount of \$143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo \$259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

* * * whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

² *Philip R. Consolo and Banana Distributors, Inc v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.
2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.
3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).
4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.
5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider * * * that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act, (2) that all of the issues as to the reasonableness

or equity of Flota's conduct were determined in the first phase of the proceeding.

Discussion and Conclusions

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only reexamined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that

it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the Board's contention that a common carrier for the public generally cannot also carry "a particular commodity on a contract basis".³ On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.⁴

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels. The

³ *Grace Line, Inc. v. Federal Maritime Board*, 263 F. 2d 709 (CA2, 1959).

⁴ *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.⁵ Of course, the courts could alter these decisions, and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable. Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such

⁵ Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transporting them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.

a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry

goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective procedure for

handling the issues involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

* * * where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines v. C.A.B.*, 184 F. 2d 545 (CA-9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.⁶ In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.⁷ Flota's assertion of this position, which was sharply disputed by the aggrieved shippers, led to a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt

⁶ 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(i), FMC Rules of Practice and Procedure.

⁷ Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

disposition of the controversy was thereby precluded, no matter what form the adjudication took.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the

Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.⁸

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition,

⁸ The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to

use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used then; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we have reexamined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of \$34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of \$30.23 per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the \$30.23 rate in its computation.⁹ We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of \$34 per ton actually charged by Flota allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than

⁹ In determining its reparation figure, the Board computed freight on the basis of 1.134 cents per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was \$30.23. Our use of the \$34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him \$36 per ton.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate above-mentioned, in our computation of reparations.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yielding a total gross profit of \$12,513,236.43 (after adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to \$1,353,139.65 and stevedoring and incidental expense amounting to \$585,876.87,¹⁰ the net profit for the 98 voyages is \$574,219.91, of which Consolo is entitled to 18.46% or \$106,001.00.

In our opinion this constitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to

¹⁰ This figure is obtained by adding the amount of \$53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959, to the \$532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals \$53,641.94).

find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission September 16, 1963.

THOMAS LISI
Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Order Directing Payment of Reparations

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al. v. F.M.C. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly reexamined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

(SEAL)

THOMAS LISI
Thomas Lisi
Secretary

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1964.

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME COMMISSION, and UNITED STATES OF
AMERICA, *Respondents*,

PHILIP R. CONSOLO, *Intervenor*.

No. 18,235

PHILIP R. CONSOLO, *Petitioner*,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF
AMERICA, *Respondents*,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Intervenor*.

[Filed Dec. 17, 1964]

On petitions for Review of an Order of the Federal
Maritime Commission.

Before: Bazelon, Chief Judge, and Wilbur K. Miller,
Senior Circuit Judge, and Washington, Circuit Judge.

Judgment

These cases came on to be heard on the record from the
Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged
by this court that the decision of the Federal Maritime Com-
mission on review herein is reversed, and these cases are
remanded to the Commission with directions to vacate its
reparation order issued thereunder.

Per Circuit Judge Washington.

Dated: Dec. 17, 1964

SHIPPING

PHILIP R. CONWELL

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

AND

FLOTA MERCANTIL GRANCOLOMBIANA, S.A.

**On Petition for Writ of Certiorari
United States Court of Appeals
for the District of Columbia**

**BRIEF OF RESPONDENT FLOTA
GRANCOLOMBIANA, S.A. IN OPPOSITION**

**JOHN K. ROBERTSON
J. ALTON ROBERTSON
1220 TWENTY
WASHINGTON
DISTRICT OF COLUMBIA
MARINE BUILDING**

WILLIAM F. BENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF RESPONDENT FLOTA MERCANTE
GRANCOLOMBIANA, S.A., IN OPPOSITION

JURISDICTION

The rulings of the Court of Appeals subject of Petitioner's first two questions presented—that that Court had jurisdiction in all respects, under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. § 1031, *et seq.*, and that it was necessary to consider

the equity of the reparations award—were made not in that Court's December 1964 decision in Case Nos. 18,230 and 18,235, but in its opinion and judgment of April 26, 1962 in Nos. 15,330, 16,366 and 16,369, when this controversy was first before it. Petitioner has failed to perfect this Court's jurisdiction to rule upon these two questions, by failing to file certified copies of the lower Court's judgment of April 26, 1962, or of Petitioner's underlying motion directed to the jurisdictional issue, or of other pertinent documents. Also, he has thereby violated this Court's Rule 21(1) and 21(3), which require the filing of a transcript of "all the proceedings in the Court below, the whole to be duly certified by the clerk of that Court".

To the extent the Court of Appeals' April 1962 judgment may be regarded as "final" for review purposes,¹ under 5 U.S.C. § 1040 and 28 U.S.C. 1254(1), Petitioner's failure to file a petition for writ of certiorari within 90 days after April 26, 1962 renders that judgment, including the Court's ruling that it had jurisdiction, immune from collateral attack in this proceeding. "The principles of res judicata apply to questions of jurisdiction as well as to other issues", as well to jurisdiction of the subject matter as of the parties." *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 78

¹ The Court's judgment of April 26, 1962 was the final order entered in Case Nos. 15,330, 16,366 and 16,369. In addition, by that judgment the Court of Appeals set aside the Federal Maritime Board's reparation order of March 30, 1961 against Flota, which had the result of rendering the reparations order unenforceable under Section 30, Shipping Act, 1916 (46 U.S.C. § 829), of relieving Flota of obligation to pay the principal or continuing interest therein provided, and of dismissal by Petitioner of his then pending enforcement suit in the United States District Court for the District of Maryland (No. 13,665).

(1939); *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932); *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525-26 (1931). See also *Angel v. Bullington*, 330 U.S. 183 (1947).

But even if the 1962 judgment is regarded as wholly interlocutory, if Petitioner desired to appeal the rulings there made, it was incumbent upon him to file with his present Petition a certified copy of that judgment and of his underlying motion papers in which he stated his position as to the lower Court's jurisdiction under the Hobbs Act. The importance of this failure is underscored by the fact that his Petition does not accurately state his position before the Court of Appeals upon that issue; the papers he failed to file with this Court disclose that Petitioner actually *invited* the lower Court to take jurisdiction in the very respects in which, having ultimately lost on the merits, his Petition now challenges. (See Appendices A, B and C of this Brief, and further discussion under Argument, Point I, *infra*). Other omitted papers, the Prehearing Stipulation and Addendum in Nos. 18,230 and 18,235, show that in the later round of litigation culminating in the December 17, 1964 judgment Petitioner failed to raise either an objection with respect to the Court of Appeals' jurisdiction or the matter which he now seeks to raise in his second question presented. (See Appendices D and E, *infra*).

The lower Court's judgment of April 26, 1962 is reprinted as Appendix A to this Brief. Portions of Petitioner's "Motion Of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack Of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond", and Petitioner's "Reply To Answers To Motion To Dismiss Or Require Bond"

are reprinted as Appendices B and C to this Brief. Portions of the Prehearing Stipulation (including Addendum), and Prehearing Order are reprinted as Appendices D and E. Certified copies of the complete text of each of these documents and of the lower Court's April 26, 1962 opinion have been filed with the Clerk of this Court, concurrently with this Brief.²

The Petition should be denied for lack of jurisdiction to grant the Writ, for failure to provide the Court with a proper record upon which to consider the Petition, for failure to comply with the Court's Rules, and for not having "disclosed the real situation" as to the Hobbs Act jurisdiction question in the Court below. *Connecticut Railway & Light Co. v. Palmer*, 305 U.S. 493, 496 (1939); *Erie Railroad Company v. Kirkendall*, 266 U.S. 185 (1924); *Furness, Withy & Co. v. Yang-Tsze Ins. Assoc.*, 242 U.S. 430, 431 (1917).

QUESTIONS PRESENTED

1. Where the Court of Appeals had jurisdiction under the Hobbs Act, of (a) a carrier's petition to review a finding of violation of the Shipping Act, to the extent that it served as a basis for a reparations order against the carrier, and (b) the shipper's petition to review the reparations order, in an effort to increase the amount thereof, whether that Court also had juris-

² The Court of Appeals' April 26, 1962 opinion is reprinted in the Petition, Appendix C.

Petitioner also failed to file certified copies of the Petitions for Review in any of the proceedings below. In his Petition for Review in No. 18,235 he invoked the lower Court's jurisdiction under the Hobbs Act to review the Federal Maritime Commission's reparations order to the extent it denied reparations, and described that Court's order as "reviewable under 5 U.S.C. 1031 ff." — which is the Hobbs Act (Petition in No. 18,235, p. 1). (R. 727)

diction to determine the validity of the reparations order, upon challenge by the carrier?

2. Whether the Maritime Commission is required mechanically to award reparations for a period in which the law was unsettled and the carrier was actively and in good faith seeking a declaratory order, where the record compels a finding, and the Court has so found, that such an award would be inequitable?

3. In concluding that there was no basis for the Commission's principal findings, and that the Commission had abused its discretion, did the Court of Appeals apply an improper standard of review?

4. If the Court of Appeals erred in respect of questions 2 and 3, whether its judgment is nevertheless supportable on the grounds of (a) the *ex parte* participation in the Commission's decision on remand, of its attorneys who had previously acted in this case as adversaries against Flota, and (b) the absence of legally cognizable damages to Petitioner.

STATEMENT OF THE CASE

This case involves a private claim by Petitioner Consolo, a shipper, against Respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as "Flota"), a steamship company, for reparations for alleged violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*).

In July 1955, after advertising for interested shippers and receiving no response, and in conformity with long-standing industry custom, Flota entered into a contract with Panama Ecuador, a shipper, for the carriage of bananas from Ecuador to the United States North Atlantic, in the refrigerated ("reefer") facili-

ties of Flota's vessels (JA 19, 77-82, 134-39, 173, 177-87).³ The contract term was for two years, plus three years at Panama Ecuador's option (JA 183-84). In March 1957, Panama Ecuador qualified for its option (JA 188, 195-99; SJA 181-87); the contract was formally extended on May 22, 1957, for the option period (JA 187-95; SJA 191-92).

On August 20, 1957, the Federal Maritime Board served an order in another case directing Grace Line to cancel its existing contracts with other banana shippers, including Petitioner Consolo, and to offer two-year contracts to all qualified banana shippers upon an allocation basis. The Board's order was premised on a novel theory set forth in its April 30, 1957 Report (which theory was later declared to be invalid).⁴

Petitioner Consolo, by letter of August 23, 1957, requested a share of Flota's space under contract to Panama Ecuador, and threatened litigation (JA 207-08) as did others, based upon the Board's action with respect to Grace Line. Faced with these demands, on one hand, and with threats of a breach of contract suit by Panama Ecuador on the other, Flota petitioned

³ Pertinent portions of the agency record were printed in the Joint Appendix, Supplemental Joint Appendix, and Second Supplemental Joint Appendix, filed with the Court of Appeals and certified to this Court. They are herein cited as JA, SJA and SSJA, respectively.

⁴ *Banana Distributors Inc. v. Grace Line Inc.*, 5 FMB 278, 283-86 I-II (1957), vacated and remanded, *Grace Line Inc. v. Federal Maritime Board*, 263 F.2d 709 (C.A.2d 1959). Further proceedings: *Banana Distributors, Inc. v. Grace Line*, 5 FMB 615 (1959), affirmed, 280 F.2d 790 (C.A.2d 1960) (one judge dissenting), cert. denied 364 U.S. 933 (1961).

the Board for a declaratory order as to the validity of its contract with Panama Ecuador (JA 37-41). The Board delayed decision for almost two years, until July 2, 1959 (JA 41-48, 63-68).

In February 1959, the Board's 1957 *Banana Distributors v. Grace Line* decision and order, which had precipitated the claims against Flota, were reversed and vacated (*Grace Line v. Federal Maritime Board*, 263 F.2d 709). In May 1959 the Board issued a further order against Grace Line, on a different theory.⁵ By decision served July 2, 1959, in the instant case, the Board ordered Flota to cancel its contract with Panama Ecuador, which it promptly did (JA 3-11; SJA 35). This action by the Board was the subject of a petition for review by Flota in No. 15,330 below, under the Hobbs Act. Thereafter, following further hearings on reparations, the Board in March 1961 ordered Flota to pay Consolo \$143,370.98 for the period from August 23, 1957 to July 12, 1959, embracing the entire period of the Board's own delay in answering Flota's petition (SJA 25-39; App. D to Petition). This action was the subject of cross-petitions for review below, by Petitioner Consolo, in No. 16,366, and by Flota, in No. 16,369, both under the Hobbs Act.

On July 7, 1961, Consolo filed his "Motion of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack Of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond" (App. B, *infra*), in No. 16,369, which, after argument the Court held in abeyance pending hearing on the merits. By its decision of April 26, 1962 in Nos. 15,330, 16,366

⁵ That order was ultimately sustained, by a split decision, 280 F.2d 790 (C.A.2d (1960), cert. denied, 364 U.S. 933 (1961).

and 16,369, the Court found that it had jurisdiction in all respects and that there was "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations, vacated the Board's award, and remanded the matter to the Commission, as the Board's successor, for further proceedings (SSJA 360-62; App. C to Petition, pp. 35a-37a).

On remand, without referring to the Court's finding of substantial evidence supporting Flota's contention, and on the basis of the same evidentiary record and the same arguments which that Court had already rejected, the Commission stated that there was no equity whatever in any of Flota's contentions, and reinstated the principal portion of the vacated award. The Commission's opinion, for the first time, challenged the good faith of Flota's actions in 1957, including Flota's petition for declaratory order (SSJA 399-413; App. E to Petition). After further cross-petitions, by Flota in No. 18,230 and by Petitioner Consolo in No. 18,235, the Commission produced its official minutes disclosing that the Commission's report and order on remand were written, *ex parte*, by the same Commission attorneys who had opposed Flota as advocates before the Court of Appeals in the 1962 phase of the proceedings (SSJA 425-26).

Petitioner did not challenge any aspect of the Court's jurisdiction in Nos. 18,230 and 18,235, which were consolidated (App. D, *infra*, pp. 12a-16a). In its opinion of December 17, 1964, the Court below concluded that the Commission had ignored the guideposts of the Court's earlier decision and the substantial weight of the evidence before it; that there was no basis for finding that Flota had not acted in good faith; and that the Commission had abused its dis-

cretion (App. B to Petition). The Court unanimously reversed the Commission's decision and remanded the matter to the Commission with directions to vacate the reparations order (App. F to Petition).

ARGUMENT

The Petition should be denied because (in addition to the matter set forth under the heading of Jurisdiction, *supra*), (1) Petitioner invoked the jurisdiction of the Court below upon his own petitions, and urged that it take jurisdiction also of Flota's petition; (2) the Court of Appeals' ruling that it had jurisdiction was clearly correct; and (3) the Petition presents no conflict in decision or other question of importance.

It should be emphasized that Respondents Federal Maritime Commission and United States both urged that the Court below had jurisdiction in all respects; neither objected to the Court's holding that the equity of the reparations award should be considered; and neither applied to this Court for a writ to review any aspect of the lower Court's decision.

I. Petitioner Should Not Now Be Heard To Challenge the Court of Appeals' Jurisdiction

Petitioner now challenges only the lower Court's jurisdiction to review the reparations orders to the extent they granted reparations, in Nos. 16,369 and 18,230—which involved the identical agency record and in large measure the same issues as upon Petitioner's own petition in Nos. 16,366 and 18,235. However, even this challenge by Petitioner is contrary to his position below, where he *ultimately urged the Court to take jurisdiction of Flota's petition in No.*

16,369, and did not thereafter challenge any aspect of the Court's jurisdiction in No. 18,230.

In Petitioner's "Motion Of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond", and memorandum in support thereof, and Reply to the answers thereto (see App. B and C, *infra*), he first contended that the Court did not have jurisdiction of Flota's petition in No. 16,369, but then argued that there was also evidence to the contrary and *concluded* that the Court had and should exercise jurisdiction under the Hobbs Act—in *both* No. 16,366 and No. 16,369, provided the Court require Flota to post a bond.

Petitioner's principal concern, stated to that Court, was *not* that it lacked jurisdiction of Flota's petition under the Hobbs Act, but the speculative possibility that *if* the Board's reparations orders were affirmed by the Court of Appeals in the Hobbs Act proceeding, and *if* thereafter Flota refused to obey the Board's order, he might then be compelled to resort to an independent "enforcement" proceeding in another Court, pursuant to Section 30, Shipping Act, 1916 (App. B, *infra*, p. 4a). Petitioner conceded to the Court "... that the legislative history of the Hobbs Act reveals a definite purpose to provide a new, expeditious, and exclusive method of review of agency orders" (Id., p. 6a); and that "... there is some evidence that Maritime Board reparations orders were specifically included within the coverage of the Hobbs Act" (Id., p. 6a). He stated, "Consolo for his part *accepts*⁶ any construction of the statute which

⁶ Emphasis added throughout this Brief.

results in one law suit leading to one final disposition of the controversy" (Id., p. 5a), and that

"We repeat that for our part we are *content* with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews."

He concluded, "Since review was sought here, the issues should be openly, fairly and finally litigated here—as Congress intended" (App. C, *infra*, p. 10a).⁷

After the Court's subsequent decision that it had jurisdiction, remand, and a further reparations order by the Commission, Petitioner again invoked the Court's jurisdiction under the Hobbs Act to review his petition in No. 18,235, and did not thereafter challenge the lower Court's jurisdiction to review Flota's petition in No. 18,230. Only after he ultimately had lost on the merits, did Petitioner flatly object to the lower Court's jurisdiction, in his petition to this Court.

The writ of certiorari is a discretionary writ. Even if there were a substantial and important question as to the jurisdiction of the lower Court under the Hobbs Act, which there is not, this would be a peculiarly inappropriate case for this Court to exercise its discretion to grant the petition. Issuance of a writ under the circumstances described would be promoting the

⁷ In his later brief, dated December 8, 1961, filed in Nos. 16,366 and 16,369, Petitioner concluded: "Flota has chosen to seek review of the award in this Court. All the facts are before the Court, and the controversy is ripe for final disposition. Accordingly, the Court should enter an order terminating the controversy by requiring Flota to pay Consolo the full reparation claimed in No. 16,366". (A certified copy of this brief has been filed with the Clerk of this Court). (R. 873; see also R. 824).

very "sporting theory of justice", which this Court has hitherto rejected. *Communist Party v. S.A.C. Board*, 367 U.S. 1, 31 (1961).

II. The Ruling of the Court of Appeals on the Jurisdictional Issue is Correct

The Hobbs Act gives the Court of Appeals exclusive jurisdiction "to enjoin, set aside, suspend, in whole or in part, or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. §830. Section 31 of the Shipping Act provided that

"... the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Petitioner must now contend in effect that Section 30, which authorized an "enforcement" suit "in case of violation of any order . . . for the payment of money . . .", provided the exclusive procedure for review of reparations orders under the Shipping Act and limited a carrier's review to defense of a suit under Section 30; that such was the case with respect to review of Interstate Commerce Commission reparations orders; and that therefore Section 31 was wholly inapplicable. But if all of Petitioner's premises were accepted, *arguendo*, still his conclusion that Section 31 was wholly inapplicable to enforcement suits under Section 30, is unsupportable. Section 31 applied in terms to "any order", without exception for reparations orders, and to "suits brought to enforce, suspend, or

set aside, in whole or in part, any order . . .", etc. Even if Section 30 had been intended to provide the exclusive method for review of a reparations order, Section 31 applied the full range of venue and procedure provisions applicable to Interstate Commerce Act orders, to suits under Section 30, except to the limited extent Section 30 "otherwise provided".

Further, even petitioner's premise that Shipping Act reparations orders were intended to be reviewed only "as in similar suits in regard to orders of the Interstate Commerce Commission", assumes the application of Section 31, in which the quoted language appears. Moreover, there is no indication that Congress in fact intended that Section 30 provide the exclusive method of, or venue and procedure for, review of Shipping Act reparations orders, whatever the result under the Interstate Commerce Act. The concluding provision of Section 31, that "suits brought to enforce, suspend, or set aside", etc., "may *also* be maintained in any district court having jurisdiction of the parties", is affirmative evidence to the contrary. However viewed, reparations orders were to some extent subject to Section 31 prior to the Hobbs Act, and therefore are now subject to the Hobbs Act.

Consolo's present contention would read the words "to enforce" out of Section 31; would impose unintended limitations upon the words "any order"; would frustrate the declared purpose of the Hobbs Act to apply to "all reviewable orders of the Maritime Commission" and "to secure uniform procedure with respect to all reviewable orders";⁸ and, as the Court

⁸ Hearings before Subcommittees of House Committee on the Judiciary on H.R. 1468, 1470, 2271, 80th Cong. 1st Sess. (1947), pages 137, 145, 149-50; H. Rept. No. 2122, 81st Cong. 2d Sess. (1950).

below held, would permit the anomalous situation of having the Court of Appeals review a reparations order to see if it should be increased in amount, as Consolo urged in Nos. 16,366 and 18,235, but of preventing it from considering, upon the same record, whether the award was excessive in amount or otherwise invalid, as Flota urged in Nos. 16,369 and 18,230.

The fact that Petitioner himself invoked the lower Court's jurisdiction to review the Board's reparations orders, in both No. 16,366 and, after remand, in No. 18,235, is a further answer to Petitioner's contention. Section 9 of the Hobbs Act, 5 U.S.C. § 1039(a) (App. A to Petition, p. 4a) provides that "Upon the filing and service of a petition to review, the Court of Appeals . . . shall have exclusive jurisdiction to make and enter . . . a judgment determining the validity of . . . the order of the agency". Once the Court's jurisdiction was invoked by Petitioner Consolo, the Court had exclusive jurisdiction to determine the validity of the orders in question—whether or not it otherwise would have jurisdiction.⁹

Finally, at the time the Shipping Act was passed in 1916, the state of the law under the Interstate Commerce Act was that I.C.C. reparations orders were reviewable at the instance of the carrier, without awaiting an enforcement suit. *Southern Ry. Co. v. United States*, 193 Fed. 664 (Commerce Ct. 1911); *Arkansas*

⁹ Further, the Court's ultimate finding that the Commission had abused its discretion in awarding any reparations, is as relevant in response to Petitioner's attempt to increase reparations in No. 18,235, as in response to Flota's attack upon the award made in No. 18,230. Therefore, even if the lower Court technically lacked jurisdiction of Flota's petition in No. 18,230, it had jurisdiction to enter the ultimate finding of which petitioner complains.

Fertilizer Co. v. United States, 193 Fed. 667 (Commerce Ct. 1911). See also *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 334 F.2d 46 (C.A. 5th 1964), *cert. granted*, No. 606, January 18, 1965, 379 U.S. —. Such review was in the Commerce Court prior to 1913, the jurisdiction of which was transferred by the Urgent Deficiencies Act (Act of October 22, 1913, c. 32, 38 Stat. 208, 219), to the United States district courts. Therefore, even if, by Section 31, Congress had intended that review of Shipping Act reparations orders should exactly parallel review in comparable I.C.C. cases, and had added nothing by either Section 31 of the Shipping Act or by the Hobbs Act, still Congress in 1916 must have intended that a carrier subject to a Shipping Act reparations order should be permitted to initiate review under Section 31—which review is now under the Hobbs Act.

III. Petitioner Has Shown No Other Reason for Granting the Writ

With a paucity of Shipping Act reparations cases—no more than five awards in the first forty-five years of the Act (App. B, *infra*, p. 3a)—it can hardly be maintained that there is any widespread interest justifying consideration of the case by this Court. Petitioner has not claimed that an other case turns upon the ruling below and has shown no conflict requiring resolution. The reported cases are completely consistent with the holding below. The Court explicitly held in *D. L. Piazza v. West Coast Line*, 210 F.2d 947 (C.A.2d 1954), *cert. denied*, 348 U.S. 839, that the Hobbs Act conferred jurisdiction to review denial of reparations claims, and this Court declined to review. Hobbs Act jurisdiction was exercised, without challenge, in *Kempner v. Federal Maritime Commission*, 313 F.2d

586 (C.A.D.C. 1963), *cert. denied*, 375 U.S. 813, (denial of reparations by the Commission); *Swift & Company v. Federal Maritime Commission*, 306 F.2d 277 (C.A.D.C. 1962); and *States Marine Lines v. Federal Maritime Commission*, 313 F.2d 906 (C.A.D.C. 1963), *cert. denied*, 374 U.S. 831, the latter two involving petitions for review of the partial denial and also the partial grant of reparations, precisely as in the instant case.

There can be no possible conflict here with *United States v. Interstate Commerce Commission*, 337 U.S. 426, 440-41 (1949). The Hobbs Act, which is the basis for the Court's ruling below, does not apply at all to I.C.C. orders.¹⁰ Further, in the cited case, the Court held that an I.C.C. order in a reparations case was "an 'order' subject to challenge under 28 U.S.C. §41 (28)", which procedure was incorporated by Section 31, Shipping Act, prior to passage of the Hobbs Act. It also held that review of denial of an I.C.C. reparations order should be in a one judge district court, the same as in an I.C.C. reparations enforcement suit, without a direct right of appeal to the Supreme Court. The very considerations of judicial efficiency underlying that holding argue that review of a Shipping Act reparations order should be in the same court as review of the underlying finding of violation, and of

¹⁰ The inapplicability of the Hobbs Act to the I.C.C. also distinguishes *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, No. 606, *cert. granted* January 18, 1965, 379 U.S. . . However, affirmance of the lower Court's decision in that case would provide an alternative basis to support the jurisdiction of the lower Court in the instant case. See concluding paragraph of Argument under Point II, *supra*.

The bill which ultimately became the Hobbs Act would have been applicable to the I.C.C., but by that Agency's specific request it was excluded from the final enactment (Hearings, *supra*, pp. 32-49, 152-72).

the partial *denial* of reparations, both of which Petitioner concedes must be in a Court of Appeals under the Hobbs Act. If any holding would result in an "intolerable" procedure, it is the one for which Petitioner contends.¹¹

Petitioner presents no other question to justify the attention of this Court. His contention that the examination by the Court below of the equity of a reparations award presents a "new" and erroneous standard of review is unsupportable. Further, the point was not presented to the Court below on appeal from the Commission's September 1963 reparations order (App. D and E, *infra*).

Sections 14 and 16, Shipping Act, for violation of which reparations were sought, refer to "unfair or unjustly discriminatory" action and "undue or unreasonable preference or advantage" (46 U.S.C. § 813 and § 815). They have built into them, as the Court noted, "the concepts of fairness and reasonableness" (App. B to Petition, p. 13a). Section 22 provides only that the Commission may issue such order as it deems proper, and "may" award reparations (46 U.S.C. § 821).¹² Considerations of "fairness" and "justice"

¹¹ Petitioner urges that *if* the validity of a reparations order is affirmed by the Court of Appeals under the Hobbs Act, and *if* the carrier still refused to pay, it would then become necessary to file an enforcement suit under Section 30. This question obviously is *not* presented here. In any event in such a case, the Hobbs Act findings would have a res judicata effect, as the Court of Appeals properly held (App. C to Petition, p. 32a)

¹² The Court of Appeals, believing the equitable considerations to be relevant to the award of reparations after a finding of violation, did not consider them upon the violation finding. Obviously, such considerations are relevant at one stage or the other; which stage is of little consequence, where, as here, the sole question is reparations.

have long been found to require the withholding of damages or reparations under the Interstate Commerce Act, particularly where, as here, the claimed reparations period is *prior* to enunciation of a new rule of law or standard of conduct and therefore involves retroactivity.¹³ The relevance of such equitable considerations has been recognized under the National Labor Relations Act,¹⁴ the Securities and Exchange Act,¹⁵ and a variety of other situations,¹⁶ as recently as the last term of this Court.¹⁷

¹³ *Johnson Seed Co. v. United States*, 90 F.Supp. 353 (W.D. Okla., 1950), *aff'd* 191 F.2d 228 (C.A.10th, 1951); *Delaware, Lackawanna & Western Coal Co. v. R.R. Co.*, 46 I.C.C. 506, 509 (1917); *West Coast Lumbermen's Assoc. v. A. & S. Ry. Co.*, 104 I.C.C. 695, 702 (1925); *Boston Wool Trade Assoc. v. Director General*, 69 I.C.C. 282, 309, (1922); *Andarko Cotton Oil Co. v. A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 50 (1910). See also *Detroit, G.H. & M. Ry. Co. v. Interstate Commerce Com'n.*, 74 Fed. 803, 922-23 (C.C.A.6th, 1896). Cf., *Baer Bros. Mercantile Co. v. Denver & R.G.R. Co.*, 233 U.S. 479, 486 (1914).

¹⁴ E.g., 29 U.S.C. § 160(c), and *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 198 (1941) ("The remedy of back pay, it must be remembered is entrusted to the Board's discretion; it is not mechanically compelled by the Act.")

¹⁵ *Securities and Exchange Com'n., v. Chenery Corp.*, 332 U.S. 194, 203 (1947). ("... such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or the legal or equitable principles.")

¹⁶ *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932); *Gelpeke v. Dubuque*, 68 U.S. 175 (1894); *Douglas v. Pike County*, 101 U.S. 677 (1880); 15 U.S.C.A. § 71s(a); and 26 U.S.C.A. § 7805(b). See also *Leedom v. International Brotherhood of Elec. Wkrs.*, 278 F.2d 237 (C.A.D.C. 1960).

¹⁷ *Simpson v. Union Oil Co.*, 377 U.S. 13, 12 L.ed 2d, 98, 107 (1964) ("We reserve the question whether when all the facts are known there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today.")

Petitioner's final contention is that the Court below made "its own findings of fact" contrary to the Commission's and thereby applied an improper "standard for review". The case was thoroughly briefed, argued and reviewed by the Court of Appeals—not once, but twice. Its opinions evidence painstaking review, and an intimate familiarity with the record. In its first opinion (App. C to Petition, pp. 35a-37a), the Court held that Flota had "marshalled substantial evidence in support of its contention" that it would be inequitable to force it to pay reparations for the period prior to the Board's July 1959 decision, but remanded to the Commission for further consideration. In its second opinion, the Court stated that it had hoped further consideration by the Commission "would throw light on our initial impressions"; and that it had been "prepared to affirm the Commission if it could establish that the circumstances were such as to not make it unfair to assess damages against Flota". Nevertheless, the Court concluded that "careful examination of [the Commission's] opinion, the evidence relied upon by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignored not only the guideposts of our original decision, but also the substantial weight of the evidence before it".

The Court further found that "an objective and rational examination of all the evidence reveals such equitable factors . . ." that "make reparations an inappropriate remedy in this case"; that it was unable to find a basis for the Commission's new and belated challenge to Flota's "good faith"; that Flota had acted with "substantial justification"; that the law was "unsettled"; that Flota has acted as "promptly as

possible" and that there was "no evidence Flota in any way benefited by its exclusion of Consolo"; that the latter bore, at most only the loss of "speculative" and "unrealized" profits (App. B to Petition, pp. 10a, 18a); and that in view of the foregoing, and "the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act. . . ."

The Court thus acted with complete propriety and wholly within traditional limitations of review of administrative agency action. Section 10(e), Administrative Procedure Act, 5 U.S.C. §1009(e); *Universal Camera Corp. v. National L.R.Bd.*, 340 U.S. 474 (1951) (on remand see 190 F.2d 420); *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Federal Trade Com. v. Standard Oil Co.*, 355 U.S. 396 (1958); *Hall v. Celabrezze*, 314 F.2d 686 (C.A. 6th 1963); *Celanese Corporation of America v. N.L.R.B.*, 291 F.2d 224 (C.A. 7th 1961), *cert. denied*, 368 U.S. 925; *Local No. 3, etc. v. National Labor Relations Board*, 210 F.2d 325 (C.A. 8th 1954), *cert. denied* 348 U.S. 822. Where, as here, reviewing power on the facts has been vested in a Court of Appeals it is settled policy that the Supreme Court will not undertake a further reappraisal of the record. *Communist Party v. S.A.C. Board*, *supra*, 367 U.S. at p. 69 (and cases cited); *Peurifoy v. Commissioner*, 358 U.S. 59 (1958); *Federal Trade Com. v. Standard Oil Co.*, *supra*, 355 U.S. at pp. 400-401.

The decision below is also supportable on the ground that the Commission attorneys, who had previously acted as adversaries against Flota in this litigation, improperly participated and advised in the Commis-

sion's decision on remand.¹⁸ The Court below found it unnecessary to rule upon this issue (see App. C to Petition, p. 19a, n. 16). It is supportable on the additional ground that the Commission failed to apply the proper measure of damages, as set forth in *Interstate Com. Commission v. United States*, 289 U.S. 385, 389-90, 393 (1933), and that Petitioner failed to prove compensable damages. In its April 1962 opinion, the Court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh" (App. C to Petition, p. 37a); in its December 17, 1964 decision, it referred to Plaintiff's claimed damages as the loss of "speculative" and "unrealized" profits (App. B to Petition, pp. 10a, 18a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondent Flota
Mercante Grancolombiana, S.A.*

May 14, 1965

¹⁸ See *Morgan v. United States*, 304 U.S. 1, 19-20 (1938); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Amos Treat & Co. v. Securities and Exchange Commission*, 113 App. D.C. 100, 306 F.2d 260 (1962); *Trans World Airlines v. Civil Aeronautics Board*, 102 App. D.C. 391, 254 F.2d 90, 91 (1958); Administrative Procedure Act, Section 5(c) (5 U.S.C. § 1004(c) and Section 8(b) (5 U.S.C. § 1007(b))); Final Report of the Attorney General's Committee on Administrative Procedure (1941), page 56.

1a

APPENDIX A

(Filed Apr. 26, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC., *Intervenors*.

No. 16,366

PHILIP R. CONSOLO, *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Intervenor*.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

PHILIP R. CONSOLO, *Intervenor*.

On Petitions for Review of Orders of the Federal Maritime Board, now Federal Maritime Commission.

Before: WILBUR K. MILLER, Chief Judge, and BAZELON and WASHINGTON, Circuit Judges.

Judgment

These cases came on to be heard on the record from the Federal Maritime Board, now Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that the order dated June 22, 1959, on review in case No. 15,330 is affirmed; and

(2) that the order dated March 30, 1961, on review in cases Nos. 16,366 and 16,369 is set aside, and these proceedings are hereby remanded to the Federal Maritime Commission for further proceedings not inconsistent with the opinion of this court.

PER CIRCUIT JUDGE WASHINGTON.

Dated: April 26, 1962.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME BOARD and UNITED STATES OF
AMERICA, *Respondents*.

Motion of Intervenor Philip R. Consolo 1) to Dismiss the Petition for Review for Lack of Jurisdiction, or 2) Alternatively, to Require Petitioner to File Bond

Philip R. Consolo, intervenor in Docket No. 16,369 hereby moves 1) to dismiss the petition for review for lack of jurisdiction, or 2) alternatively to require petitioner to file

a bond in the amount of \$175,000. A Memorandum in support of this Motion is attached.

Oral argument is requested.

Respectfully submitted,

ROBERT N. KHARASCH

WILLIAM J. LIPPMAN

AMY SCUPI

GALLAND, KHARASCH & CALKINS

1413 K Street, N. W.

Washington 5, D. C.

Attorneys for Intervenor

Philip R. Consolo

Memorandum in Support of Motion of Intervenor Philip R. Consolo 1) to Dismiss the Petition for Review for Lack of Jurisdiction, or 2) Alternatively, to Require Petitioner to File Bond

I. THE PROCEDURAL BACKGROUND

* * * * *

II. THE STATUTORY DILEMMA

Consolo is one of the four or five complainants ever to have received a favorable reparation order during the 45-year history of the Shipping Act, 1916. Consolo, understandably, wishes to collect. Flota, equally understandably, wishes to have the reparation order set aside by a reviewing court. It is plain that *some* court has power to order payment to Consolo, and that *some* court has power to review the reparation order. The question posed by this motion is: what court?

We set forth below the relevant statutory provisions. Essentially, there are two distinct lines of statutory authority. The Shipping Act, 1916, in § 30 (46 U.S.C. 829) provides that in case of violation of any Board order for payment of money (as Flota has violated this reparation order), the person in whose favor such order was made

may bring suit within a year in a district court, with the Board's findings and order *prima facie* evidence of the facts found. Under this provision no harm could come to Flota until Consolo files his complaint in a district court.³ When the complaint is filed, Flota can obtain from the district court (and upon appeal, from a court of appeals and the Supreme Court) a full review of the Board's order.

But Flota has not chosen to await filing of a complaint in a district court. Instead, Flota has sought review of the Board's order here, claiming jurisdiction under the Hobbs Act (5 U.S.C. 1031 ff.) Under the Hobbs Act, the courts of appeals review such orders of the Board as were formerly reviewable under § 31 of the Shipping Act (46 U.S.C. 830). (Thus, Flota relies on a second and distinct line of statutory authority to sustain its right to review in this court.

Consolo recognizes that Flota is entitled to one review of the Board's order in one court. But the filing of Flota's petition in this court presents the painful prospect of two reviews. Thus, the court might proceed to assume jurisdiction, pass upon Flota's petition, and deny it. At this point, absent any arrangement guaranteeing Consolo collection under the reparation order, Consolo would have to commence a new suit, in a district court of another circuit, to collect on the order (and such suit will have to be begun within a year of the date of the Board's order). Still worse, in such a district court suit, Flota might seek to introduce new evidence, arguing that under § 30 of the Shipping Act the Board's order is only *prima facie* evidence of the facts. Then, arguing changed facts, Flota might ask for a new construction of the law from the district court. In other words, Flota might try to obtain a double review of the Board's order, and this court's labor in re-

³ Suit cannot be commenced in the District of Columbia. We have requested counsel for Flota to accept service of a complaint in the District of Columbia, and our request has been refused.

viewing the order upon the facts of record before the Board might become so much waste motion.

A construction of the statutes which provides a double review is obviously untenable. A review in this court which does not result in a final disposition of the controversy is, equally obviously, equally undesirable. Consolo, for his part, accepts any construction of the statutes which results in one lawsuit leading to one final disposition of the controversy.

Accordingly, by this motion we move alternatively:

(1) To dismiss Flota's Petition for Review on the ground that this court lacks jurisdiction. If this motion is granted, Consolo will promptly file a complaint in a district court, and the controversy will be completely decided in that court (with a possible appeal).

(2) Alternatively, if this court determines that it has jurisdiction to review the Board's order, we move that Flota be required to file a bond guaranteeing payment to Consolo if the Board's order is sustained. In this manner, the entire controversy can be settled and concluded before this court.

• • • • •

All relevant facts bearing on this court's jurisdiction are now before this court. Only harm can come from any postponement of a decision on jurisdiction. If jurisdiction is absent, the injured shipper is entitled to begin his suit in district court at once. If jurisdiction is present, the offending carrier should be compelled to post a bond which will permit the controversy to be terminated quickly and cleanly. Absent such a bond, the petition for review becomes not an instrument for justice, but a weapon for obtaining oppressive delay through inconclusive litigation.

III. THIS COURT HAS NO JURISDICTION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME BOARD AWARDING REPARATION

• • • • •

IV. IF THIS COURT HAS JURISDICTION TO REVIEW THE BOARD'S
ORDER AWARDING REPARATION, PETITIONER SHOULD BE
REQUIRED TO FILE A BOND

We have shown above that the statutes and the precedents support the conclusion that suits to review reparation orders of the Maritime Board are *not* covered by the Hobbs Act, and thus that this court lacks jurisdiction to pass on Flota's petition. It must be conceded, however, that the legislative history of the Hobbs Act reveals a definite Congressional purpose to provide a new, expeditious, and exclusive method of review of agency orders. Thus, in House Report 2122, 81st Cong. 2d sess., the Committee on the Judiciary said:

• • • • •

There is thus evidence of a plain intent to provide a new and improved mode of review avoiding the need to make a second record before a district court. Moreover, there is some evidence that Maritime Board reparation orders were specifically included within the coverage of the Hobbs Act. Reparation orders of the Board are issued under section 22 of the Shipping Act (46 U.S.C. 821) which allows the filing of complaints with the Board, calls for Board investigation of complaints, followed by orders, and also permits the Board to "direct the payment, on or before a day named, of full reparation to the complainant for the injury caused . . ."

The then solicitor of the Maritime Commission, Mr. Page, told the House Committee on the Judiciary that "the act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the

⁹ [Text of Statute omitted]

Shipping Act, 1916, and we feel . . . that the provisions of this act should apply to all reviewable orders of the Maritime Commission [now Maritime Board] . . .”¹⁰ Following Mr. Page’s statement, and exchange of correspondence with Judge Phillips,¹¹ the Hobbs Act was amended to its present form granting to the courts of appeal jurisdiction over all orders reviewable under § 31 of the Shipping Act (46 U.S.C. 830).

Thus, there is evidence of specific congressional intent to extend Hobbs Act review to a wide range of Maritime Board orders, with the aim of utilizing the “more modern” and “best” method of review. This intent has been respected, and the second circuit has held that the Hobbs Act covers the Maritime Board’s orders denying reparation: *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

The specific questions remain, however, (1) whether the language of the statutes permits an interpretation allowing Hobbs Act review of orders *granting* reparation and (2) whether the intent of the Congress to provide a single, modern, expeditious method of review can be effectuated by providing a means for terminating the controversy in this court.

Any argument supporting review under the Hobbs Act must face at the outset that 5 U.S.C. 1032 begins by granting to the courts of appeals exclusive jurisdiction “to en-

¹⁰ Statement of Paul D. Page, Jr., Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress (1947) and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress (1949), at p. 137. Note that when Mr. Page refers to a “vast majority” of orders made under section 22 he means that most orders were made after hearings on complaints. He did not mean that a vast majority of orders required payment of reparation—for very few reparation orders have ever been entered by the Maritime Board.

¹¹ Hearings, *ibid*, at pp. 145, 147, 149.

join, set aside, suspend (in whole or in part), or to determine the validity of" named orders. There is no explicit provisions for *enforcement* of reparation orders. Nevertheless, 5 U.S.C. 1032 gives the courts of appeals jurisdiction to review such Maritime Board orders "as are now subject to judicial review under section 31 of the Shipping Act (46 U.S.C. 830)." Section 31 of the Shipping Act, in turn, speaks of "suit brought *to enforce*, suspend, or set aside in whole or part," any order of the Board. Therefore, since all § 31 powers are apparently transferred to the courts of appeals, the power to enforce reparation orders is arguably also transferred.¹² In short, if a court of appeals can "determine the validity" of a reparation order and determine that the order is valid, the valid order should be forthwith enforced by the court of appeals. It would be intolerable to contemplate a second complete review of the same controversy.

Assuming, then, that Flota's petition for review is properly before this court, there remains the practical problem of assuring that the entire controversy will be terminated here. The simplest and quickest way of assuring a quick and final end to the controversy is to require Flota to file a bond in this court in an amount sufficient to insure payment of the sum specified in the reparation order in the event this court upholds the order. Such a bond was filed in the only case we are aware of where Hobbs Act review was sought of a Maritime Board reparation order.

* * * * *

If Flota's petition for review is to be heard here, a district court suit on the reparation award clearly must be delayed. By filing its petition here, rather than awaiting suit in a district court, Flota has chosen this forum

¹² If all § 31 powers are not transferred to courts of appeals, there would remain some residual three-judge court jurisdiction—an incredible result. Cf. *Safe Harbor Water Power Corp. v. Federal Power Com'n*, 124 F. 2d 800, 804 (C.C.A. 3d, 1941), cert. denied 316 U.S. 663.

for review. All legal and factual issues can be tried here; legal arguments are of course available, and additional facts (if any) could be brought before this court by the machinery of 5 U.S.C. 1037 (c).

It is difficult to imagine what arguments Flota could use to oppose the filing of a bond. Surely, Flota cannot claim the right to a second complete review in a district court. Equally surely, there can be no question that this court in its discretion can require a bond.

Clearly, Flota has no right to two reviews; equally clearly Flota is entitled to one review. If the one review is to be in this court a bond should be posted; if no bond is forthcoming Flota's petition should be dismissed.¹⁵

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,
Respondents,
PHILIP R. CONSOLO, *Intervenor.*

Intervenor's Reply to Answers to Motion to Dismiss or Require Bond

We repeat that for our part we are content with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews. The procedures of section 30 requiring suits in district courts

¹⁵ Alternately, the petition could be held in suspense until the controversy is decided in district court.

are tortuous, and highly advantageous to the offending carrier. If the Hobbs Act can be read to allow Flota the option of having its review here, well and good. Flota's election to precipitate review here will speed up termination of the controversy. The issues can be settled here, and if the merits justify a finding that the Board's order was right and valid, the controversy should be at end, and Flota should pay its just debts.

Flota, however, although reprinting the lengthy specification of errors of law and fact which appeared in its petition for review, claims (Answer, p. 27) that even if this Court finds the Board right on the law and the facts, another review is necessary in district court because "a whole range of other issues [all unspecified] is possible." Such a concept of the reviewing function is offensive. If Flota thinks there are "other issues" which are valid defenses, it should have presented them to this Court—or awaited review in the district court and not sought review here. Since review was sought here, the issues should be openly, fairly, and finally litigated here—as Congress intended. There may be two roads to review, but a litigant must choose one.

D. The Bond

The last pages of Flota's answer (Answer, pp. 28-36) contend that this Court, having jurisdiction, should not adopt the procedural means to assure a final disposition of the case. Essentially the claim is that this Court lacks "enforcement" powers and that a bond would confer such powers. The conflict with previous Flota arguments is obvious.

Thus, Flota argues that this Court has jurisdiction (a) because the Hobbs Act transferred all section 31 powers to the courts of appeals and (b) because 31 did apply to reparation orders. Well and good, for if this is so, the section 31 powers "to enforce, suspend or set aside" are

in this Court, and justice can be done between the parties. To do justice requires that a bond be filed, or, if Flota refuses, the dismissal or suspension of review proceedings awaiting disposition of a suit in district court.

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Respectfully submitted,

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Attorneys for Intervenor
Philip R. Consolo

August 8, 1961

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230
C. A. No. 18235

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

Prehearing Stipulation

The parties to the above proceedings Flota Mercante Grancolombiana, S.A., (petitioner in No. 18230 and intervenor in No. 18235); Philip R. Consolo, (petitioner in

No. 18235 and intervenor in No. 18230); and respondents Federal Maritime Commission and United States of America (in both proceedings), by their respective attorneys, hereby stipulate as follows:

1. The parties will (and hereby do) jointly request the court to consolidate the above proceedings.

2. Questions Presented.

Counsel have conferred regarding stipulation of the issues herein, but have failed to reach agreement.

(a) Flota Mercante Grancolombiana, S.A., states the issues in case Nos. 18230 and 18235 as follows (upon the assumption they will be consolidated):

Where this Court had previously found "substantial evidence" supporting petitioner's [Flota's] contentions that it would be inequitable to force it to pay reparations for violations of the Shipping Act, had set aside a reparations order against Flota, and had directed the Federal Maritime Commission "to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board":

1. Whether the Commission erred in thereafter finding, contrary to the Court's findings, that there was no equity whatever in Flota's contentions; in refusing to permit further evidence, and in reinstating the principal portion of the vacated award, under the same measure of damages; whether it failed to consider and make findings upon all relevant circumstances and issues; and whether its findings, rulings, and conclusions are supported by substantial evidence, consistent with law, and sufficient to sustain its ultimate conclusions.

2. Whether the preparation of the Commission's Report and Order and participation in the Commission's

private meetings, by the same attorneys who had earlier contended to this Court that Flota had violated the Shipping Act and should be forced to pay reparations, and by their subordinates, and the failure to disclose these facts and to permit Flota to except to their undisclosed proposed report and order, violated sections 5(c), 3, 7, and 8 of the Administrative Procedure Act or deprived Flota of fair administrative procedure.

3. Whether the Commission overstated the reparations award, by understating costs, overstating the length of the reparations period, and failing to make proper findings upon the issue of mitigation of damages.

4. [In case no. 18235 only], whether the Commission erred in reducing the former award in two respects and in denying the shipper's claim for prejudgment interest.

(b) Petitioner Philip R. Consolo states the issues as follows:

When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparation (in a second award after a remand from this court)

- (1) By computing the reparation award based on a freight rate in effect after the period of exclusion rather than using as a basis the freight rate actually in effect during the period of exclusion;
- (2) By computing the reparation award based on stevedoring costs at a port not served during the reparation period rather than the port served during the reparation period;

- (3) By denying interest both from the times of injury to the date of award, and from the date of the first reparation award.

(c) Respondents Federal Maritime Commission and the United States of America state the issues as follows:

- (1) Where the Court of Appeals remanded this case to the Commission "to consider whether, under all circumstances it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board," did the Commission, upon considering the equity of the award, as directed by the Court, properly reject Flota's claim seeking a reduction of, or elimination of reparations, on equitable grounds?
- (2) Did the Commission employ a lawful measure of damages in computing reparations?
- (3) In applying its measure of damages, did the Commission use accurate figures to represent gross profit from sales of bananas; freight charges; and stevedoring and incidental expense?
- (4) Did the Commission err in denying Consolo interest from the date of each sailing from which he was unlawfully excluded, and in denying Consolo interest on the amount finally awarded (\$106,001.00) from 60 days after March 28, 1961, the date of the Board's first order awarding reparations to Consolo (\$143,370.98)?

3. The parties will and hereby do jointly request the Court to permit the Joint Appendix heretofore filed in Case No. 15330 and the Supplemental Joint Appendix heretofore filed in Case Nos. 16366 and 16369 (all three cases being

prior proceedings before this Court involving the same administrative record as Nos. 18230 and 18235), and to be used as a portion of the printed joint appendix in the instant proceedings.

• • • • • • • •
s/ J. ALTON BOYER

J. Alton Boyer

*Attorney for Petitioner Flota
Mercante Grancolombiana*

s/ ROBERT N. KHARASCH

Robert N. Kharasch

*Attorney for Petitioner
Philip R. Consolo*

s/ ROBERT E. MITCHELL

Robert E. Mitchell

*Deputy General Counsel
Federal Maritime Commission*

s/ IRWIN A. SEIBEL

Irwin A. Seibel

*Attorney
Department of Justice*

[See Addendum, next page]

Addendum to Prehearing Stipulation

By typographical error, the parties omitted to include in the prehearing stipulation intervenor Philip R. Consolo's statement of the issues raised by Flota's petition for review, C.A. No. 18230. The following statement should be insterted directly below paragraph (3) under (b) on page 3 of the Prehearing Stipulation:

Intervenor Phillip R. Consolo states the issues raised by Flota's petition as follows:

(4) When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparations (upon remand from this court) in finding in accordance with the issue posed by the order of remand that it was not "inequitable" to force the carrier to pay reparations found to be due.

(5) [Consolo takes the position that issue #2 stated by Flota is not timely raised and not in issue.]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,230

FLOTA MERCANTE GRANCOLOMBIA, S.A.

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

No. 18,235

PHILIP R. CONSOLO

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

Before: Burger, Circuit Judge, in Chambers.

Prehearing Order

The prehearing stipulation of the parties and the addendum attached thereto, submitted pursuant to Rule 33(k) of the General Rules of this court having been considered, the stipulation and addendum are hereby approved, and it is

ORDERED that the said stipulation and addendum shall control further proceedings in this case unless modified by further order of this court, and the stipulation and addendum shall be printed in the joint appendix of the parties herein.

Dated: Dec. 16, 1963

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF
AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA,
S.A.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT*

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

STATEMENT

Petitioner, Philip R. Consolo, is engaged in the business of purchasing bananas in Ecuador and selling them in the United States (Pet. App. 22a). Flota Mercante Grancolombiana, S.A. ("Flota") is a steamship company transporting bananas in refrigerated cargo ships from ports on the west coast of South America, including Ecuador, to various ports in the United States (Pet. App. 27a-28a).

Flota had transported bananas since 1950 under special contracts giving the contracting shipper the exclusive use for a period of time of its refrigerated

("reefer") cargo space (Pet. App. 23a). In August of 1957, however, the Maritime Commission ruled that the Grace Line, which offered a reefer service generally similar to that of Flota, was a common carrier of bananas under the Shipping Act and must offer refrigerated space to all qualified banana shippers on an equal basis (Pet. App. 23a). Shortly after the Commission's initial ruling to that effect, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space (*ibid.*).

Since Flota, in accordance with its previous practice and the custom in the industry, had just signed an exclusive contract with another shipper (Panama Ecuador) covering all its reefer space from Ecuador for a period of three years (Pet. App. 10a-11a, 36a), it refused the demand (Pet. App. 23a), but almost immediately (on October 30, 1957) filed a petition with the Commission seeking a declaratory order determining whether it was required to cancel existing contracts for banana shipments (*ibid.*). On November 15, 1957, Consolo filed its complaint pursuant to Section 22 of the Shipping Act (46 U.S.C. 821), alleging that Flota had discriminated against him in the allocation of reefer space and seeking reparations in the amount of \$600,000 resulting from the loss of unrealized profits (Pet. App. 22a, 23a, 39a). The two proceedings were consolidated for hearing (Pet. App. 23a). Almost two years later, the Commission, by order dated June 22, 1959 (Pet. App. 22a), ruled that Flota was a common carrier within the meaning of the Shipping Act and had violated Sections 14 and 16 of the Act (46 U.S.C. 813, 815), by refusing to

allocate space to Consolo (Pet. App. 22a, 23a). Finally, at a proceeding commenced after the decision in 1959 as to Flota's liability, evidence concerning Consolo's damages was taken and on March 28, 1961, the Commission entered a Report and Order directing Flota to pay Consolo \$143,370.98 in reparations.

On May 23, 1961, Consolo filed a petition for review in the court of appeals, challenging the Commission's award of reparations as inadequate (Pet. App. 22a). On May 24, 1961, Flota filed a petition in the same court, claiming that Consolo was not entitled to any reparations.¹

Consolo filed a motion to dismiss Flota's petition on the ground that the court of appeals had no jurisdiction under the Hobbs Act (5 U.S.C. 1031, *et seq.*) to review orders awarding reparations on petition of the party charged (Pet. App. 30a)²; it argued that Flota could obtain review of such an order only by

¹ Flota had previously filed a petition for review challenging the Commission's determination of June 22, 1959, that it was a common carrier of bananas and had discriminated against Consolo in the allocation of cargo space in violation of Sections 14 and 16 of the Shipping Act (Pet. App. 22a). The issues raised by this petition were held in abeyance pending the outcome of *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933, a similar case (*id.*, n. 2). These issues as well as those raised by the 1961 petitions were heard together below and decided in one opinion (Pet. App. 20a-37a).

² No challenge was made to the court's jurisdiction to review Consolo's petition challenging the Commission's reparations award as inadequate. Nor was any challenge made to the court's jurisdiction to entertain Flota's petition seeking review of the Commission's 1959 determination of liability.

refusing to pay the award and defending the refusal in a suit to collect on the award brought by the shipper in the district court pursuant to Section 30 of the Shipping Act (46 U.S.C. 829). The court denied the motion, stating that, regardless of the practice under the Interstate Commerce Act (Pet. App. 30a-31a), the language and legislative history of the Hobbs Act indicated that Congress intended "to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable" (Pet. App. 32a). It ruled that no such distinction was inevitable in the present case. Moreover, since Consolo's petition challenging the adequacy of the award was clearly reviewable in the court of appeals, the court held (Pet. App. 31a): "Once here, the order should be reviewable in its entirety, and the rights of all parties considered [citation omitted]."

On the merits, the court affirmed the ruling of the Commission that Flota had violated the Shipping Act by refusing to allocate space to Consolo (Pet. App. 27a-30a). It held, however, that in view of the unsettled nature of the law concerning the status of such carriers as Flota and the latter's prompt attempt to obtain a determination of the lawfulness of its existing contracts, the Commission failed to give adequate consideration to the question whether, notwithstanding the violation, it was inequitable in the circumstances to require reparations (Pet. App. 36a-37a). Noting that the Commission may have erroneously believed that it was *required* to grant repara-

tions once it found a violation of the Act, the court remanded the case to the Commission for consideration of the issue "whether, under all the circumstances, it is inequitable to force Flota to pay reparations * * *" (Pet. App. 37a).

After further consideration on remand, the Commission determined (Pet. App. 59a-67a) that the law concerning the status of such carriers as Flota and its contracts was not unsettled at the time in question and that under this and all the other circumstances of the case it could not agree that Flota had acted in good faith so as to make it unfair or inequitable to assess damages against it. The Commission ruled, however, that the original reparation figure of \$143,370.98 had been improperly calculated (Pet. App. 67a-69a) and that the actual damages resulting from lost profits due Consolo amounted to \$106,001.00 (Pet. App. 69a). A final order (Pet. App. 70a-71a) directing Flota to pay Consolo reparations in that amount was entered on September 16, 1963. Both parties again petitioned for review.

The court of appeals reversed (Pet. App. 6a-19a). It noted (Pet. App. 9a) that, notwithstanding the court's prior conclusion to the contrary, the Commission on remand asserted that the law was *not* unsettled in 1957 when Flota filed its petition for a declaratory order concerning the status of its contracts. It noted further (*id.*, 17a) that Flota was being made to pay for the Commission's own delay in rendering a declaratory order. Reviewing the circumstances concerning the "reasonableness of Flota's behavior in

1957" (Pet. App. 11a), the court concluded (Pet. App. 9a):

The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Final judgment (Pet. App. 72a) was entered directing the Commission to vacate the reparation order issued on September 16, 1963.

DISCUSSION

Petitioner asks this Court to grant review of both jurisdictional and substantive questions concerning the reparation provisions of the Shipping Act of 1916 which arise out of the prolonged course of the present litigation. The government did not seek review of the decision below, because it believed that the court's disposition of the jurisdictional question was correct—although for a reason far narrower than that adopted by the court below—and that the substantive questions did not merit further review. We do not, however, oppose the grant of certiorari, limited to the jurisdictional question presented. That issue—involving the jurisdiction of courts of appeals to review reparation orders of the Maritime Commission—is of substantial importance, and is, moreover, as petitioner contends, closely related to the question presented in No. 606,

Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.

1. Petitioner contends that the present case raises, under the Shipping Act, the same question as to jurisdiction to review reparation orders as is already before the Court under the Interstate Commerce Act in *Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.* (No. 606, this Term). Thus, Section 30 of the Shipping Act (46 U.S.C. 829), like Section 16(2) of the Interstate Commerce Act (49 U.S.C. 16(2)), permits a shipper to bring suit in the district court to collect on a reparation award if the carrier refuses to pay it, and affords the shipper certain advantages such as choice of venue, freedom from costs, and the right to attorneys' fees if successful. Petitioner notes that the ruling of the court below—sustaining direct appellate review of a Commission reparation award on the petition of a carrier—will largely deprive injured shippers of these benefits, the very result the Interstate Commerce Commission and the United States are attempting to avoid in No. 606.

In the proceedings before the court of appeals in the present case, the United States and the Federal Maritime Commission argued that the language and legislative history of the statutes governing review of Maritime reparation orders, in particular the Hobbs Act (5 U.S.C. 1032), required a different result from that contended for in the *Atlantic Coast Line* case. On further consideration, however, we have reached the conclusion that the review provisions governing reparation orders of the Federal Maritime Commission and the Interstate Commerce Commission are fundamentally alike, as petitioner contends, and that

for reasons very similar to those we have urged in No. 606, this Term, the courts of appeals do not in general have jurisdiction to review, on a carrier's petition, reparation orders of the Federal Maritime Commission.

Section 30 of the Shipping Act of 1916 provides the means by which a shipper may obtain enforcement of a Federal Maritime Commission reparation order by suing for damages in a trial court; it corresponds closely, as we have noted, to Section 16(2) of the Interstate Commerce Act. For reasons identical to those we have set forth in our brief in the *Atlantic Coast Line* case, we believe that Congress also intended Section 30 to be the means by which carriers could obtain review of Commission reparation orders—by setting forth their contentions as defenses in a shipper's suit for enforcement of the order. Carriers were not to bring separate proceedings for review under Section 31 of the Shipping Act, a provision which is by its terms applicable only if Section 30 is not.³ In 1950, the Hobbs Act substituted review in the court of appeals for review "pursuant to the provisions of Section 31, Shipping Act, 1916, as amended". 64 Stat. 1129, 5 U.S.C. 1032. But review of reparation orders at a carrier's request, which had never been under Section 31 of the Shipping Act, remained in the district courts in enforcement pro-

³ Section 31 of the Shipping Act corresponds closely to 28 U.S.C. 1336 and 1398, provisions for review of Interstate Commerce orders which, we have argued in the *Atlantic Coast Line* case, do not authorize review of a reparation order at the suit of a carrier.

ceedings under Section 30 of the Act. Nothing in the legislative history suggests a contrary conclusion. In short, we believe that a carrier can in general obtain review of a reparation order only by defending against the enforcement proceeding brought by a shipper in a district court.

We did not petition for further review by this Court, however, because we think that the situation changes when the *shipper* first seeks review of the reparation order in the court of appeals. Here, petitioner first invoked the jurisdiction of the appellate court, asking for an increase in the amount of the award. In this circumstance, economy of judicial effort requires a full review of the questions of reparations in the court of appeals, rather than piecemeal litigation with some issues (the propriety of an increase in the amount awarded) decided by the court of appeals and other issues (the propriety of a denial of all reparations or a reduction in the amount awarded) decided by the district court. In short, if the shipper calls upon the court of appeals to increase the amount of reparations granted by the Federal Maritime Commission, it cannot object to the same tribunal reviewing the propriety of the reparations in fact awarded.

In sum, although we believe that jurisdiction was properly assumed on the particular facts of this case, we do not oppose the grant of certiorari with respect to the jurisdictional question because the opinion below is not limited to the facts of this case, and because even the narrow issue presented by the case is not without substantial difficulty and some importance.

2. We do not believe that further review of the other questions presented by the petition is necessary at the present time.

(a) In its first opinion, the court below remanded the case to the Commission for consideration of the question "whether, under all the circumstances, it is inequitable to force Flota to pay reparations" (Pet. App. 37a). The court found that the Commission might have erroneously believed that it was *required* to grant reparations once it found a violation of the Act, whereas the pertinent language of Section 22 of the Act (46 U.S.C. 821) provides merely that reparations "may" be directed in such a case. On remand (Pet. App. 59a), the Commission noted its agreement that the award of reparations is not mandatory. Petitioner contends (Pet. 10-11) that these rulings inject a new standard into Section 22 and that a shipper, in addition to proving the violation and his damages, now must also prove that the payment of reparations would be "equitable."

The rulings below merely recognize that, under Section 22, the direction to pay reparations is discretionary with the Commission. The statute's careful use of the permissive word "may" reflects an intent that the administrative agency, which is expert in the problems of the industry, not be compelled automatically to grant reparations following a violation of the Act, without regard to circumstances militating against such award. While it may be assumed that in a great majority of cases where carriers have violated the act they should be compelled to pay damages to shippers injured by the violation, the Commission

should not be foreclosed from exercising discretion in this area in appropriate cases. The Interstate Commerce Commission exercises a very similar discretion when it finds that a rate or practice is unreasonable as to the future but not as to the past, and accordingly forbids the practice but denies reparations. We believe that there is no difference in substance between that firmly established mode of procedure and the differently worded procedure adopted by the Federal Maritime Commission and the court of appeals in the present case.

Moreover, the existence of such discretion on the part of the agency does not increase the burden on the complaining party. Proof of the violation and his damages makes out a *prima facie* case for the complainant; the burden is then on the carrier to persuade the Commission that special circumstances nevertheless warrant a refusal to direct payment of reparations. The court of appeals held that the carrier had sustained its heavy burden of establishing that such special circumstances existed in the present case, but the problem is unlikely to arise in any significant number of cases.

(b) Finally, petitioner urges (Pet. 12-14) that, in holding that the cumulative weight of all the circumstances rendered it inequitable to require reparations, the court below made its own findings of fact and substituted its own judgment as to the weight of the evidence for that of the Commission. We believe there is merit to this contention. Nevertheless, we do not believe that the issue calls for this Court's intervention.

The determination whether it is equitable to grant reparations in a particular case involves subtle considerations of a party's good faith and the reasonableness of his conduct under the circumstances in the industry. Different inferences may be drawn from the same evidence and this is precisely the type of determination as to which the judgment of the Commission is entitled to great weight. If that judgment is rational and has an adequate basis in the record, it should not be disturbed even if the reviewing court, had it been the trier of facts, would have reached a different result. See, *e.g.*, *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194.

In the circumstances of the present case, however, the reviewing court's redetermination of the equities did not involve a flagrant disregard of the limitations of review. Its decision was inextricably intertwined with its conclusion as to the unsettled nature of the law at the time of Flota's violation; it believed that the Commission erred in ruling that there could have been no confusion as to the guiding rules. On this purely legal issue, the Commission's determination was entitled to less deference than on other matters. The instant case therefore does not present the "rare instance" calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings. *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490-491.

CONCLUSION

For the foregoing reasons we do not oppose the granting of a writ of certiorari limited to Question 1 of the Petition.

Respectfully submitted,

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MAY 1965.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION
UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Respondents

On Petition for Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**SUPPLEMENTAL BRIEF OF RESPONDENT FLOTA
MERCANTE GRANCOLOMBIANA, S.A., IN OPPOSITION**

This Supplemental Brief is submitted in response to the "Memorandum For The Federal Maritime Commission And The United States". While affirmatively opposing the grant of certiorari with respect to certain substantive issues sought to be reviewed by Petitioner, the Government's Memorandum concludes that "we do not oppose" the granting of a writ of certiorari

limited to the issue of the Court of Appeals' jurisdiction under the Hobbs Act (5 U.S.C. § 1031 ff.).

Respondent Flota believes that this Court should have before it the full text of the Government's position as to the Court of Appeals' jurisdiction, as stated to that Court in behalf of the United States and the Federal Maritime Board; it is therefore reprinted as Appendix A to this Supplemental Brief.* The United States and the Federal Maritime Board both urged to that Court that it exercise jurisdiction in all respects, as contrasted to the narrower position now asserted in behalf of the Government.

However, even in its latest Memorandum, the Government urges that the lower Court's disposition of the jurisdictional question was correct (pp. 6, 9).

This concession by the governmental respondents, coupled with their opposition to certiorari on the remaining issues, provides, we submit, the soundest possible reason for denying the writ. This Respondent has already been subjected to eight years of litigation in defense of a reparations claim which the Federal Maritime Board and Maritime Commission unanimously agreed was groundless in major part, and as to which the Court below held, after twice considering the case, that an award of reparations would be inequitable and an abuse of discretion. This Respondent should not be subjected to still further litigation, and this Court's docket still further crowded, simply to provide an occasion for the Court to render an ad-

* A true copy ("Reply of Respondents To Intervenor's Motion To Dismiss Or Require A Bond") has been filed with the clerk of this Court.

visory opinion upon an issue it is not required to decide.

Nor should the Government's present position with respect to the jurisdictional issue be regarded as a request that certiorari be granted. The Government's Memorandum emphasizes that neither the United States nor the Federal Maritime Commission itself petitioned for a writ of certiorari. In the "Memorandum in Opposition to Petitioner's Motion for Consolidated Oral Argument", filed in this case in behalf of the Interstate Commerce Commission and the United States, the Solicitor General concluded that "The Maritime Commission wishes also to note that it did not petition for a writ of certiorari, although its order was vacated by the judgment sought to be reviewed in No. 992". That Memorandum also emphasizes the differences in this case and the issue in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, No. 606.

Any suggestion that the issue here may have a general importance is refuted by the fact that there has been a paucity of reparations awards under the Shipping Act—no more than five in its first 45 years of Administration, according to Petitioner (App. B to Flota's Brief in Opposition, p. 3a). The practical considerations of venue and procedure in review under the Shipping Act, applicable principally to ocean carriers in foreign commerce, as well as the governing review statutes, are considerably different from those under the Interstate Commerce Act, which applies to thousands of rail, motor, and inland water carriers, and reaches into every hamlet in the country.

CONCLUSION

The Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME BOARD and UNITED STATES
OF AMERICA, *Respondents,*

and

PHILIP R. CONSOLO, *Intervenor.*

**Reply of Respondents to Intervenor's Motion to Dismiss
or Require a Bond**

Intervenor, Philip R. Consolo (Consolo), has moved to dismiss the petition for review for lack of jurisdiction or alternatively to require petitioner to post a bond. Respondents United States and Federal Maritime Board (the Government) take the position that this Court has jurisdiction and therefore oppose so much of the motion as requests dismissal. As to the request for the bond, the Government believes that this is a matter primarily between the private parties to this litigation and that it would be inappropriate for the Government to comment on it.

On March 28, 1961, the Federal Maritime Board (the Board) entered an order directing Flota Mercante Gran-colombiana (Flota), a common carrier by water in foreign commerce, to pay to Consolo, a banana importer, the sum of \$143,370.98 as reparations for injury caused by Flota's violation of Sections 14 and 16 of the Shipping Act, 1916, as amended (46 U.S.C. 812, 815). On May 23, 1961, Consolo filed with this Court (No. 16,366) a petition for review of

that order requesting *inter alia* that this Court direct the Board to make a supplementary award of \$426,111.69 in addition to the award of \$143,370.98. On May 24, 1961, Flota filed with this Court (No. 16,369) its petition for review asking *inter alia* that this Court set aside the order making the award of \$143,370.98. The Board's order of March 28 is thus the subject of cross-petitions for review. Both Consolo and Flota are dissatisfied with the reparation award, Consolo because it is smaller than the amount he believes himself entitled to, Flota because it believes Consolo is not entitled to any award at all.

Consolo's motion to dismiss for lack of jurisdiction is addressed solely to Flota's petition to review (No. 16,369). Consolo's theory is that while an order *denying* reparations is subject to review exclusively in a court of appeals under § 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032), an order *granting* an award is subject to review solely in the district court under § 30 of the Shipping Act (46 U.S.C. 829). Thus, under Consolo's theory, the Board's order in the instant case, insofar as it denied Consolo the full amount claimed, is subject to review only in a court of appeals while insofar as it granted him a portion of the claimed amount is subject to review only in a district court. We believe that Consolo is mistaken and that the Board's order in both its aspects is subject to this Court's jurisdiction.

Flota's petition to have this Court determine the validity of and set aside the Board's order awarding Consolo reparations is based on Section 2 of the Judicial Review Act of 1950 (5 U.S.C. § 1032). That section provides that the several courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Board as were previously "subject to judicial review pursuant to

the provisions of Section 31, Shipping Act, 1916 * * *.”¹ Section 31 of the Shipping Act, 1916 (46 U.S.C. 830),² states that “except as otherwise provided” the procedure governing suits “to enforce, suspend, or set aside, in whole or in part, any order of the [Board]” shall be the same as in similar suits “in regard to orders of the Interstate Commerce Commission * * *.”³ The procedures for setting aside or modifying Interstate Commerce Commission orders by the district courts were established by the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220. Thus, Board orders which prior to 1950 were reviewable under the procedures established by the Urgent Deficiencies Act were transferred by the Judicial Review Act to the jurisdiction

¹ Section 2 of the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1032, provides in pertinent part as follows:

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

² Section 31 of the Shipping Act provides as follows:

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

³ The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), neither of which relates to suits to *set aside* Board orders. Section 29 provides for suits by the Attorney General to enjoin violations of Board orders. Section 30 provides for suits by private parties to enforce unsatisfied Board awards of reparations.

of the several courts of appeals. The issue here is whether an order granting reparations was an order thus reviewable.

The applicable review provision of the Urgent Deficiencies Act was incorporated in 28 U.S.C. (1946 ed.) § 41(28), the substance of which now appears in the Revised Code as 28 U.S.C. 1336 (See *United States v. Interstate Commerce Commission*, 337 U.S. 426, 432), and provides:

“Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.”

Prior to the Supreme Court's decision in *United States v. Interstate Commerce Commission*, 337 U.S. 426, it was thought that a reparation order, whether granting or denying reparations, was not an “order” subject to challenge under the Urgent Deficiencies Act. See the dissenting opinion in *United States v. Interstate Commerce Commission*, *supra*. In that case, however, which involved a suit by the United States in its proprietary capacity as a shipper to set aside an order of the Commission denying it reparations, the Court squarely held that the reparation order issued by the Commission was “an ‘order’ subject to challenge under 28 U.S.C. (1946 ed.) § 41(28),” i.e., under the Urgent Deficiencies Act, 337 U.S. at 440-441.⁴ See also *Pennsylvania Ry. v. United States*, 363 U.S. 202, 205. This view has since been applied to a Maritime Board order. *Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839.

⁴ The Court went on to hold that although the order was subject to review under the Urgent Deficiencies Act, a three-judge court, normally convened pursuant to that Act (see 28 U.S.C. 2325) would not be required to hear the case on remand. It so held because it concluded that a reparation order was not of the character which Congress had in mind when it provided the expedited appellate procedure which results from a hearing before a three-judge court. 337 U.S. at 442-443.

The pertinent legislative history of the Judicial Review Act of 1950 provides no basis for distinguishing between reparation orders and other types of orders. Indeed there is evidence, as Consolo himself concedes (Memorandum, p. 17), "that Maritime Board reparation orders were specifically included within the coverage of the [Judicial Review] Act." An earlier version of the Act, H.R. 2916, 81st Cong., 1st Sess., provided only that the several courts of appeals should have exclusive jurisdiction of "final orders of the [Board] entered under authority of sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended." All other orders of the Board were to "remain unaffected * * *." Hearings before Subcommittee 2 of the House Committee on the Judiciary on H.R. 2915 and H.R. 2916, 81st Cong., 1st Sess., p. 107. Spokesmen for the Board, while agreeing with the general purposes of the bill, recommended that H.R. 2916 be broadened. They stated (*id.*, p. 145):

* * * the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to all reviewable orders of the regulatory agencies involved * * *.

* * * As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, * * * and while the [Board] has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the [Board], it can be definitely stated that the largest number of important regulatory orders which the [Board] issues comes under section 22 of the Shipping Act, 1916. * * *

Section 22 of the Act (46 U.S.C. 821), it should be noted, is the complaint section of the Act pursuant to which Consolo instituted the administrative proceeding and is the section which authorizes the Board to make reparation orders. In keeping with the views it disclosed to Congress,

the Board offered an amendment providing for review in the courts of appeals of such final orders of the Board "as are subject to judicial review, pursuant to the provisions of section 31 of the Shipping Act, 1916 * * *." *Id.*, pp. 149-150. Explaining the proposed amendment, the Board's representatives stated (*id.*, p. 150):

That provision [section 31 of the Shipping Act, 1916] is the one which brings the orders of the [Board] under the provisions of the Urgent Deficiencies Act.

This bill * * * makes those provisions applicable to reviewable orders under the Urgent Deficiencies Act.

The language ultimately adopted by Congress in the Judicial Review Act is virtually identical with that proposed by the Board. The legislative history thus fully confirms the intention of Congress to transfer to the court of appeals jurisdiction over all proceedings to modify or set aside final Board orders issued under the Shipping Act, including reparations orders issued under Section 22 of that Act.

The reparation order here in issue involves "the same parties, the same disputes, the same claims for money damages, and the same statutes." *United States v. Interstate Commerce Commission*, 337 U.S. 426, 443. Yet under Consolo's view, as we have already noted, Consolo may challenge the order insofar as it denied him the full amount claimed only in this Court but Flota may challenge the order insofar as it allowed Consolo any amount only in the district court. Such a view is hardly in keeping with the Congressional objective in passing the Judicial Review Act which was to make for "simplicity and expedition" in reviewing the orders of the Board and other designated agencies. H. Rep. 2122, 81st Cong., 2d Sess. 4.

The dictum in *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850 (N.D. W.Va.), aff'd *per curiam* 283 U.S. 804, cited by Consolo (Memorandum p. 14), that a reparation order is not "any order" within 28 U.S.C. § 41(28) (i.e., the Urgent Deficiencies Act) and therefore

"is not one which may be enjoined or set aside under title 28, § 41(28)," flies squarely in the face of the contrary holding in *United States v. Interstate Commerce Commission*, 337 U.S. 426, discussed *supra*, and is no longer the law.

We agree with Consolo that Flota is entitled to but one review of the issues raised by its petition to review. But that is all Flota will get if the Board order in Consolo's favor is affirmed since, as was said in *In Re Federal Waters & Gas Corp.*, 188 F. 2d 100, 104 (C.A.D.C.), cert. denied sub nom. *Chenery Corp., et al. v. S.E.C., et al.*, 341 U.S. 953:

"When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of the reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become *res judicata*. [citations omitted]"

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MAY 21 1965

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No.  63

PHILIP R. CONSOLO, *Petitioner*,
v.
FEDERAL MARITIME COMMISSION,
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and
FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, *Petitioner,*

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FEDERAL MARITIME COMMISSION,
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and

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On Petition for Writ of Certiorari to the
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REPLY BRIEF FOR PETITIONER

**I. As to the Question of Jurisdiction of the Court of Appeals
to Review Reparation Orders**

A. The Memorandum for the Federal Maritime Commission and the United States agrees that the jurisdictional question presented by the Petition is:

(a) of substantial importance and (b) "closely related to the question presented in No. 606 . . ." Further, the Government Memorandum agrees that Petitioner is right in his position that the Hobbs Act (5 U.S.C. 1032) does not confer jurisdiction upon the courts of appeals to review reparation orders at a carrier's request. The Government Memorandum suggests, however (p. 9), that "the situation changes when the *shipper* first seeks review of the reparation order in the court of appeals" (recognizing that even this question is "not without substantial difficulty and some importance"). This suggestion requires two brief comments:

(i) The Government's Memorandum takes the position that the statute does *not* confer jurisdiction on the courts of appeals to hear carriers' suits attacking reparation orders. The Memorandum does not explain (except in the interests of "economy of judicial effort") how the statutory jurisdiction can be expanded because the shipper had to protect his rights by a suit in a court of appeals. This is plainly not a situation where the courts of appeals act as courts of general jurisdiction: they have no powers to award damages to injured shippers, and their jurisdiction is restricted to review "pursuant to the provisions of Section 31 of the Shipping Act, 1916 . . ." Section 31 simply does not include review of reparation orders at carriers' request, and Section 31 can not be amended by other proceedings in the courts of appeals. Thus, this case does raise the broad, important, question as to the jurisdiction of the courts of appeals under the Hobbs Act.

(ii) When the former Federal Maritime Board refused to grant full reparation, Petitioner (the injured shipper) was required to bring his suit to review the

partial refusal in the court of appeals on the authority of *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

In *Piazza*, the court refused to apply the holding of *United States v. Interstate Commerce Commission*, 337 U.S. 426 (one-judge review of denials of reparation) to Maritime Board orders. Whether *Piazza* is right or wrong is not directly in issue here, but the validity of the reasoning in *Piazza* could very well be affected by a badly-needed decision of this Court settling the jurisdiction to review reparation orders under the Shipping Act. Thus, it seems likely that the substantial jurisdictional question tendered by the petition will, if decided, also dispose of the suggestion that the court below somehow acquired jurisdiction to deny reparation because *Piazza* sent the injured shipper to a court of appeals before bringing suit in a District Court.¹ In any event, the confusion as to jurisdiction to review reparation orders is evident, as is the need for guidance by this Court.

B. The Brief for Respondent Flota (the carrier) also calls for two brief comments:

(i) Flota first argues (Br., pp. 9-12) that Petitioner "should not now be heard" to challenge the jurisdiction of the Court of Appeals. In support of this argument, respondent reprints petitioner's motion to dismiss for want of jurisdiction, omitting the extensive argument that showed the court had no jurisdiction. We want to be plain that what remains in the appendix to Flota's

¹ It is also worth noting that the carrier (Flota), not the shipper, came first to the court of appeals (on November 13, 1963) seeking review of the Commission's second reparation order here in issue, followed by petitioner, the shipper (on November 14, 1963). We do not, however, believe that the sequence of filing affects the jurisdictional issue—the jurisdiction is statutory, and the statute turns on no such minutiae.

brief is petitioner's claim that *if* the court of appeals took jurisdiction, it should have required the carrier to post a bond: in this way a court of appeals might have enforced the reparation order and terminated the controversy. What the court of appeals did, however, was to hold it had jurisdiction to review but not to enforce any order. This construction means that an injured shipper can lose but cannot win on a court of appeals review—a result which effectively repeals the reparation remedy provided by the Shipping Act.

(ii) Flota's Brief (pp. 12-15) argues that "the ruling of the court of appeals on the jurisdictional issue is correct." This, we can assume, is an appropriate type of argument to this Court if the writ of certiorari is granted, but it does not constitute an answer to the Petition for the writ. The Petition asserts that it is urgent and important for this Court to decide whether the ruling of the court below was correct. It may be useful, however, to point out that Flota's discussion of sections 30 and 31 of the Shipping Act (establishing different procedures for reparation orders and other orders) omits reference to Section 29 of the Shipping Act. Section 29 makes an explicit and significant distinction: it speaks of "any order of the Federal Maritime Board, other than an order for the payment of money" (i.e., a reparation order). This distinction is crucial.

2. As to the Standard of Review in Reparation Cases

The Government's Memorandum says (pp. 10-12) (i) that the "equity" doctrine announced by the court below is not a new standard and (ii) that the court below erred in substituting its judgment for the agency's judgment, but that this was not "flagrant." Flota's Brief (pp. 17-20) (i) repeats parts of the deci-

sion of the court below and (ii) asserts that "relevance of such equitable considerations" has been recognized under other statutes.

A. Neither the Government Memorandum nor Flota's Brief cites a single case where any court has held that an agency must decide whether reparation would be "equitable" *when the agency has found the carrier's past practices to be unjustly and unreasonably discriminatory*. Of course, as the Government's Memorandum says (p. 11), the Interstate Commerce Commission has "discretion" to find that a rate is unreasonable for the future but perhaps not for the past. Agencies have broad discretion. But no precedent holds that when there has been a finding that a rate or practice was unreasonable and discriminatory in the past, a new, hitherto undiscovered, and undefined "equitable" power exists to deny reparation.

The uncertainties raised by the newly-discovered "equitable" standard are graphically illustrated by the argument appearing on page 11 of the Government's Memorandum. The Memorandum says that proof of statutory violation and damages shifts a burden to the carrier—a "heavy burden"—to show that special circumstances (undefined) warrant a refusal of reparation. These suggestions for procedure in reparation cases are highly novel. The same rules of burden of proof do not appear in the decision below; quite the contrary, the decision below asserts that the reparation remedy is of declining and minor importance (App. to Pet., pp. 9a-10a).

The injection of a new standard justifying denial of reparation is not a mere matter of semantics. Such a new standard, if it existed, would call forth a host of new litigation seeking to define the "equities" in future cases. Such a new standard, if it existed, would require

new rules of evidence and burden of proof, as the Government's Memorandum shows. The existence or non-existence of such a standard is, plainly, a matter of major importance warranting this Court's attention.

B. Further, the issue Petitioner raises is not restricted to the question whether the agency has "equitable" discretion to deny reparation. The agency here found that it would be equitable to award reparation. The point is that the court of appeals decided that it was for the court, not the agency, to decide the equities. Thus, the new and undefined "equitable" standard is not alone a standard for agency action; in practice it amounts to a new standard of judicial review. The Administrative Procedure Act has somehow, in practice, been amended to include a new standard for court review where the reviewing court of appeals will decide what is "equitable." This goes far beyond any previously known doctrine and raises a broad issue as to roles of agencies and courts urgently calling for this Court's attention.²

3. As to the Jurisdiction of this Court

Flota's Brief (pp. 1-4) contains a number of assertions purporting to challenge this Court's jurisdiction to grant the writ sought. The confusion thus invoked can be simply dispelled by restating again what the court below did.

² The Government's Memorandum (p. 12) suggests that the court of appeals decision was "intertwined" with a legal issue—whether the law was unsettled, thus justifying the carrier's conduct. Not so; the carrier announced at the beginning of the hearing that it *accepted* the Maritime Board's precedent as "good, valid law". (Quoted by the court below in its first decision—App. to Pet., p. 28a). The issue is not a legal issue, but a question of motivation—of fact—as to whether unsettled law had anything to do with the carrier's actions. Again the presence of such an issue demonstrates the pitfalls of a doctrine calling for a determination of undefined "equities".

The judgment as to which the writ of certiorari is sought is the December 17, 1964 judgment of the Court of Appeals (App. to Pet., p. 72a, duly filed with this Court) which finally determined the controversy by reversing and vacating the reparation order of the Federal Maritime Commission. The earlier decision of the Court of Appeals below did not terminate the controversy. The earlier decision sent the case back to the Commission for an additional finding: to consider whether it would be inequitable to force Flota to pay reparation.³ The court's language (App. to Pet., p. 37a) seemed to say that the court was going to respect the agency's new-found discretion to decide the "equities." After the agency found, on the same record, that it would be highly equitable to require payment of reparation, the court, on second review, determined to deny all reparation, no matter what the agency found. It is this final judgment as to which the writ is sought.

CONCLUSION

The petition for writ of certiorari should be granted.

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May 21, 1965

³ Contrary to Flota's assertion, one certified copy of the earlier decision was filed with this Court; the copy was not designated as part of the record because the writ is sought as to the final judgment of the court below.

SEP 29 1965

No. 63

JOHN F. DAVIS, CLERK

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S.A., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 686-698) is reported in — App. D.C. —, 342 F.2d 924 (1964). The prior opinion of the Court of Appeals which remanded the case to the Federal Maritime Commission (R. 650-667) is reported in 112 App. D.C. 302, 302 F.2d 887 (1962).

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on December 17, 1964 (R. 699). The petition for certiorari was filed on March 16, 1965 and was granted on June 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); see 5 U.S.C. § 1040.

QUESTIONS PRESENTED

Where the Federal Maritime Commission found that a common carrier by water had discriminated against a shipper by denying him space in violation of Sections 14 and 16 of the Shipping Act, 1916, 46 U.S.C.A. §§ 812, 815, and entered an order awarding reparation to the injured shipper:

1. Did the Court of Appeals have jurisdiction under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C.A. § 1031 et seq., to review the reparation order on petition of the carrier, thus subjecting the shipper to a double set of judicial proceedings in enforcement of a reparation order, or was it required to relegate the carrier to the defense of a suit brought by the shipper in a district court under Section 30 of the Shipping Act, 1916, 46 U.S.C.A. § 829, thereby preserving the venue and other advantages which Section 30 affords to shippers?

2. Was the Court of Appeals correct in announcing a new standard for award of reparation: that the Commission should find reparation to be "equitable" in addition to finding the carrier's discrimination to be unjust and unreasonable?

3. When the Commission upon remand found that award of reparation was equitable and found as a

fact that the carrier's defenses were not bona fide, did the Court of Appeals apply a proper standard for review in setting aside the order by making its own contrary findings of fact?

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq., and the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Pertinent provisions of Sections 14, 16, 22, 29, 30 and 31 of the Shipping Act and Sections 1031, 1032, 1039 and 1040 of the Hobbs Act are set forth in Appendix A hereto, pp. 1(a)-5(a).

STATEMENT

1. THE EXCLUSION.

Petitioner Philip R. Consolo ("Consolo") is an independent importer of bananas into the United States; such importers must obtain supplies of bananas in Ecuador, where fruit is freely available (R. 86). Bananas must be imported from Ecuador under refrigeration (R. 87-88). Flota Mercante Grancolombiana ("Flota") is a common carrier by water in the foreign commerce of the United States (R. 74-75). Flota maintained a regular weekly service from Ecuador to United States North Atlantic ports with ships having refrigerated cargo space in one hold suitable for carriage of bananas (R. 76; 77), the balance of the ships being used for general, non-refrigerated cargo (R. 77). Only Flota and the Grace Line maintained regular weekly service from Ecuador with refrigerated space suitable for banana carriage (R. 86). The Federal Maritime Board, the agency administering the Shipping Act, 1916 (39 Stat. 728, as amended; 46 U.S.C.

801, et seq.)¹ has twice held that the Shipping Act compelled the Grace Line, as a common carrier, to offer refrigerated space to all qualified banana shippers.²

In June, 1955, Flota had entered into an exclusive dealing contract with one banana importer, Panama Ecuador Shipping Corporation, for the exclusive use of all refrigerated space on Flota's ships coming from Ecuador to United States North Atlantic ports (R. 177); this contract had a three year renewal option (R. 184). In February, 1957, as a result of repeated demands by Consolo (R. 97-98; 150) Flota informed Consolo he could "favor our company with a bid" for refrigerated space (R. 204b-205) (no rate was quoted). Prior to receiving Consolo's bid, on March 13, 1957 Flota's Board of Directors decided to continue its exclusive-dealing contract with the preferred shipper (R. 432-433; 436-437).

The Federal Maritime Board's second decision striking down such exclusive contracts as illegal discriminations appeared April 29, 1957: *Banana Distributors v. Grace Line*, 5 F.M.B. 278. Flota, aware of the decision (R. 152) nevertheless signed another three-year exclusive contract with its preferred shipper on May

¹ The Federal Maritime Commission is the present successor agency to the Federal Maritime Board; 1961 Reorganization Plan No. 7, 26 F.R. 7315, 75 Stat. 840, note 46 U.S.C.A. § 1111.

² Philip R. Consolo v. Grace Line, 4 F.M.B. 293 (June 23, 1953); *Banana Distributors v. Grace Line*, 5 F.M.B. 278 (April 29, 1957), remanded for additional findings, *Grace Line v. Federal Maritime Board*, 263 F. 2d 709 (C.A. 2, 1959); Supplemental Report 5. F.M.B. 615 (1959), affirmed 280 F.2d 790 (C.A. 2, 1960), cert. denied 364 U.S. 933.

22, 1957 (R. 187). Finally, on June 21, 1957, Consolo was notified that the contract had been signed (R. 207).³

Consolo renewed his demand for space (R. 208), and on October 21, 1957 counsel for Consolo notified Flota that if a fair amount of space was not allotted to Consolo a complaint would be filed with the Federal Maritime Board on November 15, 1957 (R. 209). Flota still gave Consolo no space, and instead filed a petition for declaratory order with the Board (R. 37-41). Consolo's complaint was duly filed on November 15, 1957, seeking space and reparation for exclusion.

During the course of the Board hearings in 1958, Flota's preferred shipper threatened to breach its contract unless rate concessions were forthcoming (R. 151-152). Flota granted such concessions (R. 191-195) without offering any space to Consolo (R. 150).

2. THE LITIGATION.

(a) Proceedings Before the Board

Flota's counsel opened his defense at the Board hearing by announcing that Flota accepted the Board's decision in *Banana Distributors v. Grace Line*, 5 F.M.B. 278 (1957), as "good law but inapplicable because of the differences [in vessels] which we have set forth..." (R. 133-134).⁴

³ The preferred shipper also obtained space on the Grace Line as a result of the *Banana Distributors* decision (R. 155).

⁴ This position of Flota is highly significant because of Flota's later claim that it was confused by the unsettled state of the law. It was not confused (R. 134):

"Mr. Giallorenzi [counsel for Flota] Again I repeat, assuming that the [Banana Distributors] Grace Line decision is good, valid law, and we are not attacking that in any manner shape or form—

"Examiner Robinson: You think your facts differentiate your case from the necessary holdings in the Grace Line case?

"Mr. Giallorenzi: That is right."

In the first phase of the hearings the Board's Examiner, and the Board, found that "the arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive" and held that Flota had violated sections 14 and 16 of the Shipping Act by discriminating against Consolo (*Consolo v. Flota Mercante Grancolombiana*, 5 F.M.B. 633, 639-40, June 22, 1959). Flota was ordered to open its space to all qualified banana shippers upon a fair and reasonable basis (5 F.M.B. at 642), and the case was returned to the Examiner for determination of reparation due.

In the next phase of the hearings, on reparation, Consolo proved in enormous detail his damages, sailing by sailing, for each sailing from which he was excluded by Flota (R. 445-449). The Examiner recommended and award of reparation of \$259,812.26, plus interest (R. 255-262). The Board, upon exceptions, cut the award back to \$143,370.98, by restricting the period of reparation, and the basis of allocation of space to Consolo, and denied any interest (6 F.M.B. 262, March 28, 1961; R. 265-280). Flota did not pay.

(b) First Opinion on Review

Flota filed two separate petitions with the Court of Appeals for the District of Columbia Circuit, the first attacking the Board's decision on the merits (i.e., the Board decision of June 22, 1959, 5 F.M.B. 633 that Flota had violated the Shipping Act), and the second attacking the decision awarding reparation (the decision of March 28, 1961, 6 F.M.B. 262; R. 265). Consolo sought review of the Board's reduction of the reparation award.⁵

⁵ Consolo's petition followed the holding in *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839, that denials of reparation are reviewable under the Hobbs Act. The Piazza case is discussed below, at pages 23-29.

Flota's petition to review the reparation order claimed that jurisdiction to review existed under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Shipping Act reparation orders are not self-enforcing, the shipper being required by section 30 of the Act (46 U.S.C. 829) to file suit on a reparation order in a District Court in order to collect. In previously reported cases under the Shipping Act, the offending carrier had awaited suit to present its defenses: e.g., *Roberto Hernandez, Inc. v. Arnold Bernstein, Inc.*, 116 F. 2d 849 (C.C.A. 2d, 1941).

Consolo moved to dismiss the Flota petition for review for want of jurisdiction or, alternatively, to require Flota to file a bond, pointing out that Flota was seeking two reviews of the reparation order, one in the Court of Appeals and one in District Court when Consolo sued to enforce the order (R. 621-636).

The Court of Appeals, in its decision of April 26, 1962 (*Flota Mercante Grancolombiana v. Federal Maritime Commission*, 112 U.S. App. D.C. 302, 302 F. 2d 887; R. 650):⁶ (1) Affirmed the decision of the Board on the merits that Flota had violated the Shipping Act by discriminating against Consolo; (2) Considered the jurisdictional question, finding it "not free from doubt or difficulty" but held that reparation orders are reviewable under the Hobbs Act on a carrier's petition (although not enforceable by the Court); (3) Denied Consolo's petition for review of the reparation order; and (4) As to Flota's petition for review of the reparation orders, announced a new standard of review for reparation orders, holding that

⁶ By this time the Federal Maritime Commission had succeeded to the duties of the Federal Maritime Board. See fn. 1, p. 4, *supra*.

the Board should have considered "whether, under all the circumstances, it is inequitable to force Flota to pay reparations"—remanding for such determination (302 F. 2d at 896; R. 667).

(c) Second Commission Decision on Reparations

After receiving briefs and hearing oral argument, the Federal Maritime Commission on September 19, 1963 again reviewed Flota's excuses for excluding Consolo, held that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith", and entered a new reparation order. (2 Pike and Fischer Shipping Regulation Reports 961 (September 16, 1963); R. 500, 513). The amount of reparation, however, was again reduced (to \$106,001) since the Commission accepted a new Flota argument that Flota would have charged Consolo a higher freight rate than it actually charged its preferred shipper. Flota, followed by Consolo, again petitioned the District of Columbia Court of Appeals for review.

(d) Second Court of Appeals Decision

In its second decision, the Court of Appeals purported to review the evidence; made its own determinations as to what Flota "might reasonably have believed", "might have thought in good faith" and "could reasonably have believed"; and held "in view of the substantial evidence showing that it would be inequitable to assess damages" that the Commission's reparation order should be vacated. (*Flota Mercante Grancolombiana v. Federal Maritime Commission*, 342 F. 2d 924 (C.A.D.C., 1964); R. 686-698).

Consolo's petition for a writ of certiorari as to the three questions presented was granted by this court

on June 1, 1965, 381 U.S. 933, and the case set for argument immediately following No. 14 (October Term, 1965) a case which involves a question of jurisdiction to review Interstate Commerce Commission reparation orders similar to the first question presented here.

SUMMARY OF ARGUMENT

I. THE STATUTES PROVIDE ONLY ONE REVIEW OF A REPARATION ORDER: BY A DISTRICT COURT AFTER SUIT BY THE INJURED SHIPPER

Here, a common carrier by water (Flota) has discriminated against a shipper (Consolo) by totally denying him refrigerated space. At common law, an excluded shipper had a swift remedy: to sue the carrier. The Shipping Act, 1916 substituted a several-step procedure for the common law remedy. First, the agency administering the Act must find a violation. Next, the agency must find damage and enter a reparation order. Finally, the shipper must sue on the reparation award in a district court.

A reparation order is not self-enforcing, nor does a carrier risk anything by failing to comply with such an award. *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 430. Section 30 of the Shipping Act (46 U.S.C. 829) deals specifically with reparation orders and provides that they are to be "prima facie" evidence in suits brought upon reparation awards in district courts. Nevertheless, in order "to discourage harassing resistance by a carrier" and "to promote a closer observance by carriers of [their] duties" (*Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 482-83), Section 30 grants shippers the benefits of attorney's fees if they prevail, excuses shippers from costs, and provides convenient venue for suit.

The decision below holds that Section 2 of the Administrative Orders Review Act of 1950 (Hobbs Act) (5 U.S.C. 1032) gave the courts of appeals jurisdiction to review orders granting reparation, because the Hobbs Act transferred to the courts of appeals jurisdiction to review (but not to enforce) such orders as were subject to judicial review pursuant to Section 31 of the Shipping Act (46 U.S.C. 830). Section 31, however, is not the section of the Shipping Act dealing with reparation orders. Reparation orders are covered by Section 30 (46 U.S.C. 829) which provides for suits by injured shippers in a district court. In such a suit, a carrier can present all defenses, and the injured shipper is protected by the special provisions of Section 30. Thus, the language and structure of the Act negative any intent to provide for carrier-instigated review of reparation orders. Therefore, no such jurisdiction was transferred by the Hobbs Act.

The nature of a reparation order as prima facie evidence, "not final or binding" upon the carrier, has led to a uniform understanding that such orders are not subject to direct judicial review at a carrier's instance, evidenced by the consistent practice of carriers to await suit by shippers: *United States v. Interstate Commerce Commission*, 337 U.S. 426, 435; *Roberto Hernandez Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941); *United States v. Interstate Commerce Commission*, 198 F. 2d 958, 963-64, note 2 (C.A.D.C., 1952), cert. denied 344 U.S. 893.

The review contemplated by the decision below is an anomaly. Because the courts of appeals cannot enforce reparation awards, it adds to an already difficult schedule of litigation an unnecessary, non-final and intermediate review, where the shipper cannot win

but may lose. Indeed, since the court of appeals order is not binding and conclusive (on the carrier) the decision below raises the Constitutional question whether a case or controversy is being heard: *Chicago and Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14.

The decision below is in conflict with the teachings of *United States v. Interstate Commerce Commission*, 337 U.S. 426, 441-43. Contrary to this Court's decision that cases involving reparation were to be heard only by one-judge district courts, the court below holds that three judge courts of appeals substituting for three judge district courts can review reparation awards. The conflict is directly evident, as is the impolicy of the decision below.

II. THE HITHERTO UNKNOWN STANDARDS OF DECISION AND REVIEW ANNOUNCED BY THE COURT BELOW ARE JUSTIFIED BY NEITHER STATUTE, NOR PRECEDENT, NOR POLICY

Although the court below affirmed the agency's decision that Flota had unjustly discriminated against Consolo, it remanded the reparation order for consideration whether it would be "inequitable to force Flota to pay reparations". The doctrine that an agency cannot make an award of reparation for unjust exclusion without finding it "equitable" is a new principle of carrier law, hitherto unknown.

Next, after the agency on remand found all equities in favor of the injured shipper, the court below itself reviewed the evidence *de novo*, made its own findings of fact, and reversed.

Both the substantive doctrine of "equity" announced below and the mode of review employed below require

explicit rejection by this Court to prevent serious damage to the rights of injured shippers. Both are clearly wrong.

The Shipping Act speaks of unjust, unreasonable or unfair discriminations and prejudices, the well-known touchstones of agency discretion to regulate. The statute does not mention "equity". The sudden importation of such an unknown standard into regulatory law leaves agencies at sea, a confusion which can only benefit carriers defending otherwise plainly illegal acts.

All past cases have emphasized the fundamental nature of a common carrier's duty to carry, and concur in holding that reparation is due for failure in the duty: *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121; *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936); *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941). In short, there is no doctrine of "equitable" refusal to award reparation for damages from unjust exclusion, and there ought to be none.

The standard of review employed by the court below is equally unknown to the law. Neither the Shipping Act nor the Hobbs Act grants any jurisdiction to reviewing courts to determine facts *de novo*. Yet, the court below proceeded to find facts anew, as to Flota's state of mind when it excluded Consolo. The court below did not inquire, as it should have, whether there was substantial evidence in the record to sustain the findings of the agency (as there plainly was). This, however, is the standard of review time and again laid down by this Court: *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 207; *Rochester*

Telephone Corporation v. United States, 307 U.S. 125, 145-46. In order to return the law of judicial review in reparation cases to its proper place within the established pattern of judicial review, the decision below should be reversed.

ARGUMENT

I. THE STATUTES PROVIDE ONLY ONE REVIEW OF A REPARATION ORDER: BY A DISTRICT COURT AFTER SUIT BY AN INJURED SHIPPER

A. The Shipping Act, 1916

At common law, the remedy of a shipper refused space by a common carrier was swift and simple: the shipper sued the carrier. Ocean carriers were no exception: *Swayne & Hoyt v. Everett*, 255 Fed. 71, 74 (C.C.A. 9th, 1919). Indeed, the liability of a common carrier to suit was often stated as part of the definition of a common carrier. In *The Wildenfels*, 161 Fed. 864, 866 (C.C.A. 2d, 1908), the Court cited Moore on Carriers:

“According to all the authorities, the essential characteristics of the common carrier are . . . that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.”

The Shipping Act did not destroy, but reinforced common law liability for illegal exclusion. The Shipping Act “embodies a remedial system that is complete and self-contained” and “gives a cause of action for damages”. *Terminal Warehouse v. Pennsylvania R. Co.*, 297 U.S. 500, 514.

The remedial system embodied in the Shipping Act, 1916, and the procedure to be followed by injured

parties, are clear on the face of the statute. Sections 14 and 16 of the Act (46 U.S.C.A. 812, 815) prohibit discriminatory acts. Section 14 Fourth, in particular, forbids any common carrier by water (such as Flota) to "make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of . . . cargo space accommodations. . . ." Flota's action in totally excluding Consolo and contracting all its refrigerated space to a single preferred shipper plainly was, and was held to be, a violation of this section.

Moreover, Section 16 First (46 U.S.C.A. 815), in more sweeping language, forbids any common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It is hard to imagine a prejudice or disadvantage more sweeping than an outright denial of any space. Flota's total exclusion of Consolo for a period of years was, and was held to be, a plain violation of Section 16.

A shipper injured by a forbidden act of a carrier is given two remedies by Section 22 of the Shipping Act (46 U.S.C. 821): first, the injured shipper may file a complaint, which the Board may investigate and "make such order as it deems proper." Second, the Board "may direct the payment . . . of full reparation to the complaint for the injury caused by such violation." Thus, there is both a public and a private remedy provided for violations of the Act.

The public remedy is an order of the agency requiring the carrier to behave in the future. Here, the

public remedy is found in the order of the Federal Maritime Board requiring Flota to open its refrigerated space to all future qualified banana shippers (R. 11-13; 5 F.M.B. 633 at 641-43). The private remedy is a reparation order, repairing the damage done by the past violation of the Act. The reparation order itself has long been recognized to have two beneficial aspects. Substituting for the common law liability of common carriers, it repairs a harm (which is in the public as well as private interest) and, in addition, it promotes "a closer observance by carriers of the duties so imposed [by the statute]". *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 433; *Baldwin v. Scott County Milling Co.*, 307 U.C. 478, 482.

Absent a provision for reparation, the remedial system of the Shipping Act would be incomplete. Past wrongs would not be righted, and there would be no "healthy deterrent effect" upon carrier malpractices—the shipper would be "entirely at the mercy of the carrier, contrary to the overriding purpose of the Act". *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88.

The procedures laid down in the Shipping Act for enforcement of agency orders emphasize both the importance of both types of agency order and their differences. Orders of the agency "other than an order for the payment of money" (1) if violated are enforceable under section 29 (43 U.S.C.A. 828) and (2) under Section 31 (46 U.S.C.A. 830) "The venue and procedure . . . in suits to enforce, suspend, or set aside in whole or in part, any order of the [agency] shall, *except as otherwise provided*, be the same as in similar suits in regard to orders of the Interstate Commerce Commission. . . ." (emphasis supplied).

Orders for the payment of money—reparation orders—are “otherwise provided” for in Section 30 of the Shipping Act (46 U.S.C.A. 829). Reparation orders are neither self-enforcing nor subject to enforcement by the agency under Sections 29 or 31. Instead, under Section 30: (1) the injured party may file suit on the award in a United States District Court where the shipper resides, *or* where there is any office of the carrier *or* wherever the carrier calls; (2) the reparation order is “prima facie evidence of the facts therein stated”; (3) the injured party is not liable for costs (except on his appeal); (4) a beneficiary of a reparation order is entitled to a reasonable attorney’s fee if he finally prevails; and (5) provision is made for easy joinder of parties.⁷

This statutory scheme is simple: orders not for the payment of money are reviewable in three-judge courts (Section 31; 46 U.S.C.A. 830). Reparation orders are *not* reviewable by three-judge courts, because they are to be handled “as otherwise provided” in their own special section of the Act (Section 30, 46 U.S.C.A. 829). That section provides for suit to enforce reparation orders *only* by the injured party. There is no

⁷ Sections 29, 30 and 31 of the Shipping Act (46 U.S.C.A. 828, 829, 830) are of course either similar to, or outright inclusions of, provisions relating to railroads:

“While the part of the bill relating to the regulation of carriers by water differs necessarily and materially from the corresponding provisions of the interstate commerce act, the difference is not so radical that the administration and enforcement provisions of the latter act and the nearly 30 years’ experience of the Interstate Commerce Commission cannot be adopted with slight modifications to the purposes of this bill.” S. Rept. No. 689 to accompany H.R. 15455, 64th Cong., 1st Sess., at p. 12.

provision for the wrongdoing carrier to review a reparation order prior to being sued for a very simple reason: no carrier has anything to fear from a reparation order unless and until suit is brought on an order.

Consider, for example, what happens to a carrier against whom a reparation order is entered if the injured shipper does not sue on the order. What happens is precisely nothing. The shipper had a right to bring suit, but if the right is not used, the carrier suffers nothing. A reparation order is, by definition, an order for the payment of money and nothing else; it relates to a past violation. Other orders under the Shipping Act, in contrast, relate to the future, are of general effect, and are naturally reviewable at the carrier's instance.

The differences between reparation orders and other orders are not only plain on the face of the statute, they have also been plain to this and other Federal courts, as we next show.

B. The Precedents and the Uniform Practice

The Shipping Act provides a three-judge I.C.C.-type procedure for reviewing orders of general future importance, and a one-judge enforcement procedure for reparation orders. In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 441-443 the Court was at pains to emphasize "the belief of Congress that such [reparation] orders are not of sufficient importance to justify the accelerated judicial review procedure" (337 U.S. at 442).

Again, in concluding that denials of reparation should be reviewed by a one-judge district court, this

court referred to "the same one judge trial *and appeal* procedure available for enforcement of [a reparation] order . . ." (337 U.S. at 443; emphasis supplied).

The teachings of *United States v. Interstate Commerce Commission* are unmistakeable: (1) reparation orders are essentially different from orders of general future applicability; (2) cases involving only reparation orders are to be heard by one-judge, not three-judge courts; (3) a reparation order "is not final or binding upon the railroad"—it requires a suit to enforce it (337 U.S. at 435).

The history of litigation under both the Interstate Commerce Act and the Shipping Act, 1916, evidences a uniform understanding that reparation orders are not reviewable at the carriers instance, and most certainly not reviewable in a three-judge court. For example, in *H. K. Porter Co. v. Central Vermont Ry. Co.*, 366 U.S. 272, 274 at note 6, this Court said that a reparation order "when and if made, can be challenged before a single judge . . ." The uniform practice has been for review of reparation orders to await suit by the injured shipper. The Interstate Commerce Act citations could be multiplied. Examples abound in this court: e.g. *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531; *Pennsylvania R. Co. v. Weber*, 257 U.S. 85; and in lower federal courts: e.g., *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936). Under the Shipping Act, however hard-fought the defense, carriers have again awaited suit on reparation orders: *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663 (C.C.A. 2d, 1929), cert. denied 280 U.S. 555;

Roberto Hernandez, Inc. v. Arnold Bernstein, Inc., 116 F. 2d 849 (C.C.A. 2d, 1941).

For the last half century, at least,⁸ courts have believed that a reparation order "is not a binding administrative determination . . . no such order has ever been the subject of direct judicial review." *United States v. Interstate Commerce Commission*, 198 F. 2d 958, 963-64, note 2 (C.A.D.C., 1952), cert. denied 344 U.S. 893.

C. The Hobbs Act and the Decision Below

The court below here purported to find in the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 et seq., jurisdiction to review a reparation order at the instance of the carrier, prior to suit in a District Court by the injured shipper.

The Hobbs Act, 5 U.S.C.A. 1032, grants the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . such final orders of the . . . Federal Maritime Board . . . entered under authority of the Shipping Act, 1916 as amended . . . as are now subject to judicial review pursuant to the provisions of section 830 of Title 46."

The order granting Consolo reparation was entered under authority of the Shipping Act, 1916, and the precise question is thus whether reparation orders were

⁸ Flota's reply to our petition for certiorari cites two long-forgotten Commerce Court cases as holding that prior to 1913 that courts reviewed reparation orders: *Southern Ry. v. United States*, 193 Fed. 664 (Commerce Ct., 1911); *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Commerce Ct., 1911). These cases of course predate the Urgent Deficiencies Act of 1913, 38 Stat. 208.

such orders as were reviewable "pursuant to the provisions of Section 830 of Title 46." The plain answer is: no. Section 830 (Section 31 of the Shipping Act) is *not* the section dealing with reparation orders. It is, instead, the section dealing with orders to be reviewed by three-judge courts; reparation orders were handled "as otherwise provided" in the section dealing with reparation orders.

No matter how examined, the statutory language is airtight. The courts of appeals received only jurisdiction to review the orders reviewable by three-judge courts under Section 31 of the Shipping Act (46 U.S.C. 830). Orders granting reparation are plainly not reviewable by three-judge courts under the Shipping Act itself, nor under the teaching of *United States v. Interstate Commerce Commission*, 337 U.S. 426, 441-443. Hence, the courts of appeals did not receive a grant of jurisdiction under the Hobbs Act to review reparation orders.

D. Relationship of the Issues Here and in No. 14

It may be well to pause here to note the relationship of the jurisdictional issue in this case with the issue posed in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, No. 14 (decision below, 334 F. 2d 46 (C.A. 5, 1964)). The *Atlantic Coast Line* case raises the question whether a carrier can bring suit to review an Interstate Commerce Commission reparation order prior to suit by an injured shipper. This case, of course, raises the same question under the Shipping Act. If, as both the Interstate Commerce Act and the Shipping Act plainly intend (and the nature of a reparation order requires), a carrier cannot bring suit, then the court of appeals here had no

jurisdiction to review. In other words, a decision that reparation orders are not reviewable at a carrier's instance will decide the jurisdictional issue in this case and in *Atlantic Coast Line*.

But, if it be assumed *arguendo* that the Shipping Act does somehow permit a carrier to obtain review, the question remains: where? In *Atlantic Coast Line* the carrier at least brought suit in a district court, the forum required by the decision in *United States v. Interstate Commerce Commission*, 337 U.S. 426. The district court would have jurisdiction to enforce the reparation order at the shipper's request. Here, in contrast, the carrier did not seek review by a one-judge district court, but sought review by a court of appeals with no enforcement power, substituting under the Hobbs Act for a three-judge court. This is precisely the forum which this Court said in *United States v. Interstate Commerce Commission*, 337 (U.S. at 441-443, should *not* consider reparation orders.

E. The Decision Below and Its Effects

The court below appears to have based its conclusion that it had jurisdiction on three grounds:

(1) First, said the court below, courts of appeals received, by the Hobbs Act, jurisdiction to "set aside" orders "formerly possessed by the District Court under Section 31 of the Shipping Act" (302 F. 2d at 893; R. 660). A crucial difficulty, that Section 31 dealt only with *three-judge* district court review is passed with the comment that "Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders" (302 F. 2d at 893, note 10; R. 661).

(2) The case of *D. L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839,

held that the Hobbs Act conferred jurisdiction on Courts of Appeals to review denials of reparation.⁹ Hence, said the court below here, "Once here, the order should be reviewable in its entirety" (302 F. 2d at 893; R. 661).

(3) In any event, said the court below, the Hobbs Act was intended "to clarify and simplify the review situation . . . rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable" (302 F. 2d at 894; R. 662). Each of these three grounds is demonstrably wrong.

The first ground simply begs the questions. Of course the Hobbs Act transferred Section 31 reviews to courts of appeals, but the questions are (1) whether any carrier suit to review reparation orders lies under the Shipping Act; and (2) even assuming that such a suit could have been brought under the Shipping Act, could it have been brought in any court other than a one-judge district court? Both questions were discussed above.

The second ground relied upon by the court below (that "once here the order should be reviewable in its entirety") is also wrong. The most obvious defect in the reasoning of the court below is that an order granting reparation is not "reviewable in its entirety" by a court of appeals under the Hobbs Act. The Hobbs Act confers no jurisdiction to enforce reparation orders, and an injured shipper must bring a separate suit to enforce reparation orders in a district court, under Section 30 of the Shipping Act. Considerations

⁹ The *Piazza* case of course forced Consolo to bring his petition to review to the court below.

of economy and simplicity require that a carrier's defenses to a reparation order should be adjudicated when and if a shipper sues on an order, by the court considering the suit. There is a clear difference between appellate consideration of a shipper's attempt to obtain a reparation order from an agency and appellate consideration of a reparation order issued by an agency before suit is brought on the order. A reparation order is a condition precedent to bringing suit; a shipper must reverse the agency action and obtain an order before he can sue. In contrast, when a reparation order has been issued, no further agency action is needed, and a carrier can present all defenses when suit is brought.

The decision in *D. L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), is not applicable to the jurisdictional problem presented here. *Piazza* involved a shipper's suit to review a denial of reparation. The court agreed that absent the Hobbs Act, the doctrine of *United States v. Interstate Commerce Commission*, 337 U.S. 426 required that the shipper's suit be brought in district court. But, the court in *Piazza* reasoned, (1) *United States v. Interstate Commerce Commission* found jurisdiction to review denials of reparation in what is now Section 1336 of Title 28 U.S.C.; (2) section 1336 is equivalent to Section 31 of the Shipping Act; and (3) hence jurisdiction to review denials of reparation was transferred to the courts of appeals by the Hobbs Act. Obviously, this syllogism cannot be applied to suits to review *awards* of reparation, because suits on reparation awards are governed not by Section 31, but by section 30 of the Shipping Act (46 U.S.C. 829) and section 30 jurisdiction is not transferred to courts of appeals.

Moreover, there are substantial reasons for believing that the *Piazza* decision is wrong, because it misreads *United States v. Interstate Commerce Commission*. What this Court said in *United States v. Interstate Commerce Commission*, is that in the Urgent Deficiencies Act of 1913 "Congress denied power to three-judge courts to enforce Commission orders for payment of money" (337 U.S. at 442). In a footnote at this point this Court added (337 U.S. at 442, note 15):

"It is also significant that the new judicial code does not give a three-judge court jurisdiction to adjudicate the validity of Commission orders 'for the payment of money.' 28 U.S.C. § 2321."

Further, this Court concluded (337 U.S. at 442):

"The Urgent Deficiencies Act with 49 U.S.C. § 9, which requires enforcement of Commission reparation awards, in one-judge courts, indicates the belief of Congress that such orders are not of sufficient public importance to justify the accelerated judicial review procedure."

Section 31 of the Shipping Act (46 U.S.C. 830) simply says that venue and procedure shall follow Interstate Commerce Act procedure. From this, it is highly difficult to conclude (as the court in *Piazza* did) that the Hobbs Act by transferring to courts of appeals "such orders as are now subject to review" under Section 31 of the Shipping Act (5 U.S.C. 1032) somehow transferred to three-judge courts of appeals orders which were not of "sufficient public importance" to justify three-judge district court consideration. The reasoning in *Piazza* is thus wrong, but right or wrong, the reasoning does not apply to carrier-instituted petitions to review reparation awards.

The last ground given by the court below for its assumption of power to review reparation awards is that the Hobbs Act was intended to "clarify and simplify the review situation. . . ." (302 F. 2d at 894; R. 662). We can agree that Congress did not intend by the Hobbs Act to muddy and complicate the review situation.¹⁰ Yet, the decision below does muddy and complicate review and enforcement of reparation orders, as follows:

1. Allowing a carrier the novel option to obtain review of a reparation order in a court which cannot enforce the order adds another costly and burdensome step (without benefit of the protections of section 30 as to venue, attorney's fees and costs) to the already burdensome procedure for enforcing reparation orders. Under the decision below, in addition to (a) proving that the carrier violated the Act, and (b) defending this decision on review, the shipper must (c) prove to

¹⁰ Congress intended to simplify and expedite review. H. Rept. 2122, 81st Cong. 2d Sess. makes this quite clear. It also makes clear that the purpose was to "avoid the making of two records, one before the agency and one before the court . . ." (p. 4). Yet, the decision below requires two reviews and both a record on appeal and subsequently a second record before a district court (on suit to enforce the order).

Also, it may be well to note here that the then Solicitor of the Maritime Commission (predecessor of the Maritime Board) testified in support of extending the Hobbs Act "to all reviewable orders of the Maritime Commission". (Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress, and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress, at p. 137). However, there is no discussion in the hearings of orders granting reparation, or indication that orders granting reparation were thought to be reviewable under Section 31 of the Shipping Act or otherwise except upon suit by the injured shipper to enforce the award.

the agency his entitlement to reparation and then (d) defend the reparation order in a court of appeals, plus (e) sue to enforce the order in a district court and (f) defend the district court order on appeal. This is a schedule of litigation to discourage even the stout-hearted when faced by an obdurately litigious and well-financed carrier (such as Flota), willing to drag a case through every possible court.

An offending carrier needs no intermediate, non-final, and non-necessary opportunity for review of a reparation order, because every carrier defense can be presented as a defense to a shipper's enforcement suit in a district court in the manner provided by the Shipping Act, Section 30 (46 U.S.C. 829). Appellate review by a court of appeals of the district court's order is available as a matter of course. Nowhere in the Shipping Act or in the Hobbs Act appears the slightest indication of a Congressional intent to burden an injured shipper with an intolerable schedule of litigation to obtain pecuniary redress.

2. The purposes of the special provisions of Section 30 of the Shipping Act (46 U.S.C. 829) governing suits on reparation orders are well-known. The shipper is granted the rights to choose a convenient forum, to be free of costs, to be allowed a reasonable attorney's fee, and to bring in parties freely. By such provisions, the Shipping Act, like the Interstate Commerce Act,

"... evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards.

"... One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the

payment, without suit, of just demands, does not militate against its validity * * * *

“The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order.”

—*Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 482-83, quoting: (a) *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 433, and (b) *St. Louis & S.F.R. Co. v. Spiller*, 275 U.S. 156, 159.

This unmistakable purpose of Congress is frustrated if a carrier can bring its own suit for review, and thus deprive the injured shipper of the benefits provided by Congress.

3. The extra review contemplated by the decision below is an anomaly, and not a pleasant one. It is a lawsuit the shipper cannot win. If the carrier succeeds, the shipper has lost, but if the carrier fails, the shipper has not won—because he must still bring a suit to enforce the reparation award, and the carrier can defend all over again (presumably on different grounds). Heads the carrier wins; tails the carrier does not lose. Such a concept of litigation is repugnant; it destroys the fairness required of any system of judicial review. In particular it defeats the “general legislative pattern of administrative and judicial relationships” emphasized in *United States v. Interstate Commerce Commission*, 337 U.S. 426, 435, where this Court said:

“It hardly seems possible to find from the language of § 9 a Congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all.”

To paraphrase, it hardly seems possible here to discern a Congressional intent to guarantee steamship lines an extra judicial review of reparation orders in which the shipper cannot win.

4. Finally, it is necessary to consider a fundamental question raised, but not answered, by the decision below: what is a court of appeals doing when it reviews a reparation order which may or may not be given effect by a district court judge or jury considering the evidence in a subsequent enforcement suit? To say the least, it is unusual for a United States court of appeals to be rendering an opinion on an order which is *prima facie* evidence in another court.

We need look no farther than the opinion of the court of appeals after the remand in *United States v. Interstate Commerce Commission* to learn why no court previously has directly reviewed an order granting reparation:

“By statute, such an order is not a binding administrative determination, but is simply to be considered *prima facie* evidence of the findings embodied in it in an independent action at law against the carrier. Interstate Commerce Act, § 16(2), as amended, 49 U.S.C.A. § 16(2). Thus it happens that no such order has ever been subject to direct judicial review.”

—*United States v. Interstate Commerce Commission*, 198 F. 2d 958, 963-64 note 2 (C.A.D.C., 1952) cert. denied, 344 U.S. 893.

The type of opinion contemplated by the court below is an opinion rendered before suit, without opportunity to pronounce final judgment in the shipper's favor, and capable of reversal by judge or jury in a later law-

suit. It is a kind of advisory opinion, to be rendered prior to the determination of a real case or controversy in a court which can pronounce final judgment.

This analysis reveals a definite constitutional infirmity in the decision below. The Constitution, Article III, extends the judicial power to cases, not to advice or inconclusive quasi-judgments:

"This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."

—*Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14.

There is uneasiness manifested in the opinion of the court below when it considered the course of events. "If a carrier chooses not to obey an order of the Board for payment of reparations, even after affirmance by this court * * * * the ultimate result reached in the District Court might vary considerably from the Board's order." (302 F. 2d at 894; R. 661-662). This uneasiness is justified, because the court below was committing itself to rendering the kind of opinion forbidden by the firm and unvarying practice of Constitutional courts.

II. THE HITHERTO UNKNOWN STANDARDS OF DECISION AND REVIEW ANNOUNCED BY THE COURT BELOW ARE JUSTIFIED BY NEITHER STATUTE, NOR PRECEDENT, NOR POLICY

A. The Holdings as to "Equity" and the Function of the Reviewing Court

We have described above the ill effects on all future Shipping Act reparation cases of the jurisdictional holding of the court below. There remain for consideration the equally disastrous effects of two novel doctrines affecting the rights of shippers to reparation for illegal discriminations. A decision of this Court reversing both such doctrines is vital, we believe, not only to the present petitioner's claim, but also to all future shippers injured by a carrier's illegal act.

The court below proceeded in two steps. First, although it found that the carrier, Flota, had violated the Shipping Act, it remanded the reparation order to the Federal Maritime Board "to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations" (302 F. 2d at 896; R. 667). This discovery of a doctrine of "equity" was announced without citation, and is, we believe, without precedent.

Next, the Board's successor, the Federal Maritime Commission, obedient to the court's order, considered the equities and found all equities in favor of Consolo, the excluded shipper. Thereupon, the court below—again without benefit of citation or precedent—held that the equities were all along for the court, not the agency, to determine, and denied all reparation. (342 F. 2d at 925-31; R. 689-698). In the course of this second decision the court below took occasion to note that it thought very little of the importance of the reparation remedy (342 F. 2d at 926, *ftn.* 2; R. 690).

A decision of this Court which reverses the court below solely on the jurisdictional question would solve neither this petitioner's particular problem nor the problem of future injured shippers faced with the doctrines of the court below as to "equity" and judicial review of the "equity" of awarding reparation. Both petitioner Consolo and future shippers injured by unjust and unreasonable discriminations are entitled to have their reparation cases decided free from the doctrine that the reparation remedy may disappear in a reviewing court's uncontrolled "equitable" discretion. Accordingly, we respectfully urge not just a reversal of the decision below on the jurisdictional point, but reversal as to all three questions raised by this petition.

**B. The Purported Discovery of a New Requirement of
"Equity" in Reparation Orders**

The court below held that the Maritime Board could not award reparation for a steamship line's unjust and unreasonable (and total) exclusion of a shipper unless the agency considered whether the award of proved damages would be "inequitable". Although the Shipping Act and Interstate Commerce Acts have been on the books for a very respectable period, no single citation of precedent supports this holding. The reason for such absence of citation is, we believe, that there is no precedent holding that reparation should not be paid for discriminations held to be unjust and unreasonable.

Not only is there no precedent to sustain the decision below, there is an equal lack of statutory basis. True, the Shipping Act in Section 22 (46 U.S.C. 821) says that the agency administering the Shipping Act "may" direct the payment of "full reparation to the complainant for the injury caused by such violation" of the

Act. The court below noted this "may", reading it as giving unlimited discretion to deny reparation once a violation of the Act was found (302 F. 2d at 896 fn. 17; R. 666). A reasonable reading of all of Section 22 indicates, however, that the section concludes by saying the agency "may" award reparation because it begins by saying any person "may" file a complaint. Thus the section begins and ends with "may", while it describes in between how the Board "shall" proceed to investigate. (Shipping Act, Section 22, 46 U.S.C. 821).

Section 22, while perhaps not a model of draftsmanship, certainly does not contain any hitherto undiscovered language establishing an amorphous standard of undefined "equity" for reparation awards. The brief legislative history of the section evidences only a Congressional expectation that reparation awards would follow a violation of the Act:

"Under Section 23 [now Section 22] any person may file with the Board a sworn complaint setting forth any violation of the Act. The board, after due notice to the person complained of, shall investigate the matter and make such order as may be proper, *including an award of reparation for any injury resulting from the violation.*" (Emphasis supplied).

—S. Rept. No. 689 to accompany H.R. 15455, 64th Cong., 1st Sess., p. 13.

We do not, of course, wish to be understood as arguing that the Shipping Act favors inequitable reparation awards. No reported case deals with a situation where the agency is struggling with an award it believes inequitable. Naturally so, because the Act gives the agency fullest powers to determine whether carrier behavior is "unfair or unjustly discriminatory" (Sec-

tion 14, 46 U.S.C.A. 812) or whether preferences, advantages, prejudices, or disadvantages are "undue or unreasonable" (Section 16, 46 U.S.C.A. 815). These words—"unfair", "unjust", "undue", "unreasonable"—are the touchstones of agency discretion. The agency can find behavior unjust for the future but not the past, or unjust and unfair in the past and for the future. All of these terms have long established meanings allowing agency discretion in the regulation of carriers.

The evil in the decision below is that all future injured shippers may be denied reparation not because the statute was not violated, not because carrier action was not unjust or unreasonable, but because it would somehow be "inequitable" to force a carrier to pay for the harm caused. The term is not statutory, it appears nowhere in previous cases, and its meaning is totally undefined. The common law remedy for injured shippers would be abolished in favor of the reaction of an agency's members to the equities—a sort of Commissioner's, not chancellor's foot.¹¹

Turning to the precedents, we are unable to discover any case in all the course of previous reparation litigation, marked by a great deal of carrier resistance to paying up, where any court struck down a reparation award based on a finding of unjust and unreasonable discrimination in the past, because the agency failed to consider whether the award was "inequitable".

¹¹ It is perhaps worth noting that the "equitable" doctrine is not reflexive. The court below did not hold that shippers would be entitled to an award against carriers who had behaved justly and reasonably, simply because an award would be "equitable."

On the contrary, the court below itself has told the Federal Maritime Board

“... the Board is not a court, and cannot rely for its action on the powers of a court of equity.”

—*Trans-Pacific Freight Conf. of Japan v. Federal Maritime Board*, 302 F. 2d 875, 880 (C.A.D.C., 1962).

When, as here, a carrier has refused to carry, the courts have emphasized the fundamental nature of a common carrier's basic duty to carry, and insisted on carrier liability for a wrongful refusal. A number of the common law cases are collected and reviewed in *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, 490-94 (D.C. Ore., 1953) and summarized (128 F. Supp. at 505): “The circumstances constituting the standard justifications which the common law recognized for failure to perform the obligations of a common carrier are not present here. The defendants were not prevented from transporting Ward's goods by act of God. No outright public enemies stopped them.”¹²

This Court has stated the rule of damages for failure to carry:

“At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender

¹² Every text insists on the basic duty of a common carrier to carry, and its liability for a refusal. For example, 13 Am. Jur. 2d, Carriers, § 253 says: “Whenever a common carrier refuses without sufficient legal excuse, to accept property for transportation, a right of action for the damages directly and proximately resulting from such refusal accrues to the shipper”

and their value at the proposed destination, less the cost of carriage."

—*New Mexico ex rel. McLean & Co. v. Denver & R.G. R. Co.*, 203 U.S. 38, 49.

The precedents under the Interstate Commerce Act and the Shipping Act concur in asserting both the carrier's duty to carry, and its liability to pay damages or reparation for refusal: *Pennsylvania R. Co. v. Puritan Coal Mining Company*, 237 U.S. 121; *Pennsylvania R. Co. v. Weber*, 257 U.S. 85; *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936); *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941).

In short, the settled law is that injured shippers are "entitled to full compensation for the damages sustained as a result of the wrongful discrimination against them." *Pennsylvania R. Co. v. Minds*, 250 U.S. 368, 370-71. This is a simple, salutary, and hitherto unquestioned rule. In its place, the court below would substitute a vague, undefined standard, leaving agencies and courts in all future cases without any established guides for decision.

The question whether a new barrier to the award of reparation for illegal exclusions can be suddenly discovered in the body of transportation law all but answers itself: there is no such doctrine of "equitable" denial of reparation, and there ought not to be one.

C. The Remarkable Standard of Judicial Review Applied in the Decision Below

The decision below not only makes new and bad substantive law of reparation, it applies to a decision under the new doctrine a wholly wrong standard of

judicial review. After the court below returned the case to the Federal Maritime Commission, the Commission considered each of Flota's arguments, judged its "protestations of innocent intent" and determined that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith" (R. 513). Whereupon, the Commission sharply reduced the reparation award and entered a reparation order in the reduced amount.

When the court below announced the new doctrine of "equity", it seemed as if the court intended the agency to determine what was equitable or inequitable. Not so; when the court reviewed the Commission decision as to equity, the court, not the Commission, made the decision.

The opinion of the court below does not begin, as most decisions do, with citation of the precedents defining the roles of agency and reviewing court. Instead, the court noted its belief that the reparation remedy is unimportant and becoming more so (342 F. 2d at 926; R. 690). Next, the court said that "Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy. . . ." (342 F. 2d at 926; R. 690).

There follows in the balance of the opinion a discussion of evidence which the court believed was or might be proof of Flota's good faith. This discussion begins with a wrong analysis of Flota's doubts as to its legal duties. It is very plain from the record that Flota's defense was not based on any "unsettled law"—i.e., on any doubts as to the legal validity of the Maritime Board precedents. Flota's counsel said so explicitly at the outset of the hearing: ". . . assuming that the Grace Line decision [Board precedent] is

good, valid law, and we are not attacking that in any manner, shape or form. . . ." (R. 134). In spite of this concession as to the carrier's state of mind (clearly a fact to be determined by the trier of fact), the court below held that it (the court) believed the law was unsettled.

There follow next a series of reasons (also wrong) as to why the court below thought "Flota might reasonably have believed that its situation was factually distinguishable" (342 F. 2d at 928; R. 693); why "Flota might have thought in good faith that its renewal agreement with Panama Ecuador [favored shipper] was permissible" (342 F. 2d at 929; R. 695); and why "Flota could reasonably have believed that the three-year period in its contract . . . was reasonable" (342 F. 2d at 930, R. 696).¹³

Finally, the opinion below first scolds Consolo because his damages flowed from his total exclusion by

¹³ While not expecting this court to review the evidence, we note briefly why each of these "reasonable" beliefs was plainly unreasonable:

(1) The factual distinctions between Flota ships and Grace Line ships were completely insufficient to justify exclusion of Consolo—as the Board had held (5 F.M.B. 633 at 639-40). The Board took time to consider the differences because Flota argued them—thus delaying the day it had to give space to Consolo.

(2) Flota could not have believed it could legally enter into a two year plus three-year exclusive dealing contract. The Board has approved two year contracts *only* when such contracts had been fairly offered to *all* shippers and space had been fairly apportioned. *Banana Distributors v. Grace Line*, 5 F.M.B. 615 at 626.

(3) Flota's petition to the Board for a declaratory order was, as the Board held, a sham, because Flota did not file a petition before executing its second three-year exclusive contract but only months thereafter, when Consolo threatened suit (R. 209-210; 37-41).

Flota, and last, reverses the Commission "In view of the substantial evidence showing that it would be inequitable to assess damages against Flota . . ." (342 F. 2d at 931; R. 698). This last quoted sentence reveals in summary what the rest of the opinion reveals in detail: the opinion below is an evidentiary decision *de novo* by the court below.

The decision below can be analyzed from two viewpoints: (1) as a decision holding by implication that the novel doctrine of "equity" requires a decision *de novo* by a reviewing court to decide the facts as to "equity" or (2) more conventionally, as a decision violating the large number of precedents which circumscribe the review of agency decisions, and particularly the review of determinations as to facts. From either point of view, the decision below is wrong.

If the decision below means that the novel "equity" doctrine as to reparation awards has as a proviso that the reviewing court is to determine the equities *de novo*, it does not take much argument to demonstrate that such a proviso is without support in statute, precedent, or policy. Neither the Shipping Act, the Hobbs Act, the Administrative Procedure Act, nor any other statute contains any hint of a grant of fact-finding authority to a reviewing court of appeals. On the contrary, the Shipping Act makes the agency the judge of what are unjust or unfair or unreasonable discriminations. The Administrative Procedure Act question is whether agency findings are "unsupported by substantial evidence" (Administrative Procedure Act, Section 10(e); 5 U.S.C.A. 1009(e)). The question is not, as put by the opinion below, whether there is substantial evidence showing the contrary of what the agency found,

but whether there is a basis in the record for what the agency *did* find.

Further, there is no support in the precedents for any holding that equitable considerations in reparation suits are for *de novo* determination by a reviewing court. The precedents say that where the agency findings

“are supported by substantial evidence, as they were, and where no new evidence on the subject is introduced by either party at the trial, as was the case here, it is the duty of the court to accept and give them effect.”

—*Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849, 851 (C.C.A. 2d, 1941).

Lastly, no policy considerations can be discerned in favor of giving the “equitable” power to deny reparations (if such power did exist) to a reviewing court rather than an agency. The agency itself is close to the facts, informed by experience, and best able to judge, if necessary, what is fair, reasonable, and, if necessary, equitable. The agency’s examiner and the agency twice found for the injured shipper, rejecting claims that the structure of Flota’s ships justified its behavior in excluding Consolo. Surely, such questions are and ought to be for agency determination.

There remains for discussion only the question whether any known standard of review justified the court below in making independent findings as to good faith, Flota’s state of mind, and other facts. The answer is almost self-evidently no. The precedents are numerous, well-known, and conclusive:

“Our duty is at an end when it becomes evident that the Commission’s action is based on substan-

tial evidence and is consistent with the authority granted by Congress."

—*Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 207.

Or:

"So long as there is warrant in the record for the judgment of the expert bodies it must stand . . . 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

—*Rochester Telephone Corporation v. United States*, 307 U.S. 125, 145-46, quoting *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-87.

There can be no doubt that this Court's decisions defining the scope of judicial review are applicable, and have been applied, to reparation cases. Thus, in *New Process Gear Corp. v. New York Central R. Co.*, 250 F. 2d 569, 572, (C.A. 2, 1957), cert. denied 356 U.S. 959, the court said:

"The province of the appellate court was well defined in *Virginian Ry. Co. v. United States*, 272 U.S. 658, 663 . . . as follows: 'To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province.' Nor can this Court say as to the Commission's conclusion 'that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute,' *Barringer & Co. v. United States*, 319 U.S. 1, 6-7, . . ."

In accord as to the applicability to review of reparation orders of cases such as *Universal Camera Corp. v.*

N.L.R.B., 340 U.S. 474, *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, and the like, is *United States v. Interstate Commerce Commission*, 198 F. 2d 958, 964 (C.A.D.C., 1952) cert. denied 344 U.S. 893.

Moreover, the courts of appeal have understood that when reviewing agency decisions they do not sit as courts of equity. Thus, in *National Labor Relations Board v. Southland Mfg. Co.*, 201 F. 2d 244, 245 (C.A. 4, 1952), the court said in affirming a back pay award:

“Upon review of the Board’s action we do not try the facts as a trial court nor do we review them as upon an appeal in equity. Our function is limited to determining upon the record, considered as a whole, whether the findings of the Board are supported by substantial evidence—i.e., by evidence which presents a substantial basis for the findings.”

Without multiplying citations, it is clear that there is no accepted formulation of the scope of judicial review which would support the action of the court below in making its own *de novo* determinations of the facts and the “equities”. The “equitable” doctrine announced by the court below, and its apparent proviso that the “equities” are for the reviewing court to find, require explicit rejection by this Court if the law of review of reparation orders is to return to its place in the established pattern of judicial review.

CONCLUSION

The decision below should be reversed on each of the three grounds urged above, and the case remanded to the Court of Appeals for the District of Columbia Cir-

cuit with instructions to dismiss the petition of the carrier (Flota) for review.

Respectfully submitted,

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September, 1965

APPENDIX A

A. Pertinent provisions of the Shipping Act, 1916, as amended, 46 U.S.C. § 801 et seq. read as follows:

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

• • •

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

§ 16. It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not

satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

§ 31. The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

B. Pertinent provisions of the Administrative Orders Review Act of 1950, 5 U.S.C. § 1031 et seq. read as follows:

§ 1031. As used in this chapter—

(a) "Court of appeals" means a court of appeals of the United States.

(b) "Clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed.

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed.

(d) When the order sought to be reviewed was entered by . . . the United States Maritime Commission, or the

Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require;

§ 1032. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, . . . (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

§ 1039. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency. . . .

§ 1040. An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided*, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further*, That application therefor be

duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF
AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA,
S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME
COMMISSION

OPINIONS BELOW

The opinion of the court of appeals on the judgment under review (R. 686) is reported at 342 F. 2d 924. A previous opinion of that court, remanding the case to the Federal Maritime Commission (R. 651), is reported at 302 F. 2d 887. The Federal Maritime Board¹ issued two opinions prior to the first decision of the court of appeals: the first (R. 3) (which held

¹ The functions and duties of the Federal Maritime Board, so far as relevant to this case, were transferred to the Federal Maritime Commission on August 12, 1961 (Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U.S.C. 1111, note).

that respondent Flota Mercante Grancolombiana, S. A., had violated the Shipping Act) is reported at 5 F.M.B. 633; the second (R. 265) (which assessed reparations for the injury caused Consolo by the violation) is reported at 6 F.M.B. 262. The opinion of the Federal Maritime Commission on remand from the court of appeals (R. 500) is reported at 7 F.M.C. 635.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1964 (R. 686). The petition for a writ of certiorari was filed on March 16, 1965, and granted on June 1, 1965 (R. 700; 381 U.S. 933). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

QUESTIONS PRESENTED

The Federal Maritime Commission entered an order awarding reparations to a shipper who had been injured by the refusal of a common carrier by water to sell him shipping space. The refusal was discriminatory and violated the Shipping Act. The shipper filed a petition to review the Commission's order in the court of appeals, contending that the amount of reparations awarded was inadequate. The carrier thereafter filed its own petition, and also intervened in the shipper's review proceeding, requesting the court to set aside the Commission's order in its entirety. The questions presented are:

1. Whether in general a carrier may initiate an action to set aside a reparations order, or is limited to challenging the validity of such an order by way of defense in an action brought by the shipper to enforce the order.

2. Whether, assuming that the carrier may not initiate an action to set aside a reparations order, the court of appeals may nevertheless set it aside at the carrier's urging where the case is properly before the court on the shipper's petition to review the adequacy of the award.

3. Whether the Commission's determination in this case that considerations of equity did not justify withholding reparations from a shipper injured by a carrier's unlawful conduct was supported by substantial evidence.

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*; the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.*; the Judicial Code, 28 U.S.C. 1 *et seq.*; and the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.* The pertinent parts of Sections 14, 16, 22, 29, 30, and 31 of the Shipping Act, Sections 2, 3 and 8 of the Hobbs Act, Sections 13(1), 16(1), 16(2), 16(3) and 16(12), of the Interstate Commerce Act, and Sections 1336, 1398, 2321, 2323, and 2325 of the Judicial Code are set forth in the Appendix.

STATEMENT

1. THE DISPUTE BETWEEN CONSOLO AND FLOTA AND THE INITIAL BOARD PROCEEDING

Philip B. Consolo (petitioner) is an importer of bananas from Ecuador. Flota Mercante Grancolombiana, S.A. (respondent) is a common carrier by water in the foreign commerce of the United States. Since

1955, Flota has operated several cargo vessels with reefer (refrigerated) space for carrying bananas. In July 1955 Flota entered into an exclusive contract with the Panama Ecuador Shipping Corporation to carry its bananas from Ecuador to the United States. The contract with Panama Ecuador granted it the entire reefer space on all of Flota's vessels for a two-year period with an option to renew the contract for an additional three-year period (R. 177, 183-184). The exclusive contract was executed after the Federal Maritime Board, in June 1953, had ruled that Flota's competitor, Grace Line, had violated the Shipping Act by failing to allocate its banana shipping space equitably among all qualified shippers (*Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293). The Board had reaffirmed this ruling (in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278, decided April 29, 1957) when on May 22, 1957, aware of the decision (R. 152), Flota renewed its contract with Panama Ecuador (at higher rates and on somewhat different terms), granting the shipper the entire banana space on all of Flota's vessels, to the exclusion of all other shippers, for a three-year period ending July 19, 1960 (R. 152).

In August 1957 Consolo wrote Flota demanding "a fair and reasonable amount" of banana space. Referring to the *Banana Distributors* decision, *supra*, he stated that if his request was not granted he would be compelled to file a formal complaint (R. 208). Flota rejected this and a later such demand (R. 209). On October 30, 1957, after it had discussed the situation orally with the Maritime Board's staff but received (R. 188).

no ruling, Flota filed a petition for a declaratory order with the Board, requesting a determination ("after a full hearing and upon consideration of all the evidence") (R. 40) that it was not required under the *Banana Distributors* ruling to cancel its exclusive contract with Panama Ecuador. Two weeks later, Consolo filed a complaint with the Board, pursuant to Section 22 of the Shipping Act, seeking a determination that Flota's contract with Panama Ecuador was illegal under Sections 14 and 16 of the Act, and also reparations in the sum of \$600,000, representing his damages for the past exclusion.² Flota requested the Board to delay any pre-trial conference until the appeal in *Banana Distributors* was decided (R. 61).³ The Board did not accede to this request, and, after several delays either initiated or agreed to by Flota, consolidated Flota's petition with Consolo's complaint and set the case for hearing in November 1958.

2. THE BOARD'S DECISIONS

On June 22, 1959, the Board ruled that Flota's allocation of reefer space to Panama Ecuador to the exclusion of Consolo violated the Shipping Act (R.

² Consolo later amended his complaint to increase the figure to \$850,000 (see R. 252).

³ The Second Circuit did not decide the case until February 13, 1959, at which time it reversed and remanded to the Board (*Grace Line, Inc. v. Federal Maritime Board*, 263 F. 709 (C.A. 2)). On remand, the Board again concluded that Grace had violated its duties under the Shipping Act by failing to pro-rate its banana space among all qualified shippers, and this time the Second Circuit, on July 13, 1960, affirmed (*Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933).

9-10), and ordered it to discontinue the exclusive contract with Panama Ecuador and to allocate its refrigerated space fairly among all qualified banana shippers (R. 11). Flota, pursuant to Section 2(c) of the Hobbs Act, petitioned the court below to set aside this order. The proceeding on this petition was held in abeyance pending the outcome of the second *Grace Line* appeal (see n. 3, *supra*).

Meanwhile the Board, subsequent to its decision of June 22, 1959, on the issue of violation, had held a separate hearing on the issue of reparations. The examiner had recommended an award of \$259,812.26 plus six per cent interest from the date of arrival of each vessel from which Consolo had been excluded (R. 255-262). But the Board, by order of March 28, 1961, reduced the award to \$143,370.98 (R. 280, 281). Consolo petitioned the court of appeals for a review of the Board's order, claiming that the amount of reparations was inadequate. Flota then filed a petition for review in the same court, asserting that Consolo was entitled to no reparations. Each intervened as of right (under Section 8 of the Hobbs Act) in the review proceeding commenced by the other's petition. Thus, the court now had before it the Board's order requiring Flota to grant Consolo reefer space, which Flota asked be set aside, and the reparations order, which Consolo asked be set aside in part as inadequate and Flota asked be set aside in its entirety.

3. THE COURT OF APPEALS' FIRST DECISION

The court held that the record adequately supported the Board's findings that operational difficulties and vessel limitations did not justify Flota's making an exclusive contract with a favored shipper, and that its discriminatory refusal of space was neither reasonable nor just (R. 658, 659). This aspect of the case is no longer in issue.

The court also held that it had jurisdiction to review not only the adequacy, but the validity, of the reparations order, reasoning that the Hobbs Act expressed a congressional determination that the party charged under such an order should be free to institute a proceeding in the court of appeals to challenge the order's validity (R. 662). The court also suggested that since "the case is properly here" on Consolo's review petition (as to which the court's jurisdiction was undisputed), "the order should be reviewable in its entirety, and the rights of all parties considered" (R. 661). On the merits of the reparations order, the court upheld the Board's rulings reducing the amount of the award (R. 663, 664), but thought that the Board had failed to give adequate consideration to whether it was, in the circumstances, equitable to require the payment of any reparations, and remanded the case to the Board for reconsideration of this issue (R. 665-667).

4. THE BOARD'S DECISION AFTER REMAND

On remand, the Commission (see n. 1, *supra*, p. 1) concluded that it was not inequitable to require Flota to pay Consolo reparations, although it further reduced

the amount of the award from \$143,370.98 to \$106,001.00 (R. 501-514). In reaching this conclusion, the Commission weighed the following circumstances to which the court had directed its attention.

The "unsettled nature of the law." The Commission noted that Flota, when it renewed its exclusive contract with Panama Ecuador, had acted in disregard of two Board decisions directly in point, one rendered only a month before Flota executed the renewal contract. In these decisions the Board had held, after a study in depth of banana carriage, that a common carrier could not exclude qualified shippers. Flota chose nevertheless to execute the renewal contract, the Commission found, "because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador" (R. 506).

The physical differences between Flota's vessels and the Grace Line's. The court had indicated that these differences might well have led to the conclusion that Flota "in good faith believed" that its discrimination, unlike Grace Line's, was not unreasonable (R. 665). But the Commission found that Flota had not sought to explore means of solving the problem of accommodating several shippers; it had "simply preferred its existing one-shipper arrangement" (R. 506).

The reasonableness of the three-year contract under the Grace Line decision. The Board in the *Grace Line* case had authorized forward-booking contracts with shippers not to exceed two years, leading the court to speculate that Flota's renewal of its contract with Panama Ecuador for three years "may well

have seemed to be * * * a reasonable period of time" (R. 666). The Commission pointed out that under the *Grace Line* rule the duration of the contract is not relevant until the carrier has first equitably apportioned the available space among qualified shippers, and that "Flota made no attempt to prorate its available space" (R. 510).

Flota's petition for a declaratory order and the Board's asserted delay in ruling thereon. The Commission noted that Flota's petition had not been filed until October 30, 1957—five months after Flota had renewed its exclusive contract with Panama Ecuador. Since Flota had already violated the Act when it filed its petition, it was not honestly seeking guidance as to the applicability of the Board's *Grace Line* decision. As for the delay assertedly arising from the Board's refusal to proceed on Flota's petition independently of the complaints which had been filed by Consolo and another shipper, the Commission stated that consolidation had been proper in the circumstances, and that Flota had, in any event, suffered no prejudice, since its petition, even standing alone, "would have offered no promise of a speedy resolution of the controversy" (R. 508). The Commission also pointed out that the cases had been decided by the Board with "unusual dispatch, considering the controversial nature and size of the record" (R. 509), and that the record did not support the claim that Flota had sought a prompt determination since Flota either "authored or favored" most of the requests for postponements that were made (R. 509).

5. THE COURT OF APPEALS' SECOND DECISION

Both Flota and Consolo again petitioned for review, Flota maintaining that no reparations whatever should have been assessed against it, and Consolo challenging the amount of the award as too low. The court reversed once more, and this time it directed the Commission to vacate its reparations order (R. 687-698). The court found that Flota had acted upon the basis of "reasonable doubt" as to whether its three-year renewal contract with Panama Ecuador was prohibited by the Shipping Act, and, uncertain of its legal obligation to cancel the contract, faced with demands for space by Consolo and other shippers, and threatened by Panama Ecuador with suit for breach of contract if it gave them some of Panama Ecuador's space, Flota had acted in good faith when it petitioned the Board for a declaratory order as to whether it must cancel its contract with Panama Ecuador. The court further found that the Board did not act expeditiously on that petition, noting that it did not assign a docket number to it until May 1, 1958, and then consolidated Flota's petition with Consolo's complaint, although the latter sought not only an adjudication that Flota was required to pro-rate reefer space among all qualified shippers but also reparations; and that the Board's opinion and order had not been handed down until June 22, 1959. Since the period for which reparations were granted extended from August 23, 1957, to July 12, 1959, the Board, in the court's view, was compelling Flota to pay reparations for virtually the entire period dur-

ing which Flota's petition for a declaratory order had been pending.

In weighing the equities, the court also observed that the only loss suffered by Consolo was his loss of unrealized profits, that there was no evidence that Flota had benefited by excluding Consolo, and that Consolo's position was "hardly deserving of greater sympathy than Flota's", since Consolo had himself been the beneficiary of a preferential arrangement with Grace Line, which the Board in April 1957 had held unlawful (R. 698).

SUMMARY OF ARGUMENT

I

Most Maritime Commission orders are enforceable by the agency itself. Concededly, such orders are judicially reviewable by means of proceedings brought by the aggrieved party against the agency to set aside the order. Reparations orders, however, are exceptional. They are not enforceable by the agency; nor is the party charged subject to any penalty or sanction for failure to comply. Instead, the beneficiary of such an order is specially empowered to bring a damages action to enforce it, and he is given certain special procedural advantages in the action, such as choice of venue. The distinctive procedure for enforcing reparations orders reflects a belief by Congress that such orders are generally of less public importance than other orders issued by the agency—a reparations proceeding being an essentially private controversy between (in the usual case) a shipper and a carrier. Because the agency typically lacks a direct

and substantial concern in the outcome of such proceedings, complete responsibility for enforcement is placed in the private party in whose favor the reparations award runs. It is to make it practicable for shippers—who as a class suffer from serious handicaps in litigation with carriers—to carry such a burden of enforcement, that Congress has given the shipper a procedural edge in the enforcement action.

Congress' scheme for making shippers exclusively responsible for enforcing reparations orders would be seriously undermined by holding that the carrier, in addition to being able to assert his defenses in the enforcement action, could, as in the case of other agency orders,⁴ bring an independent judicial proceeding to set aside a reparations order; for, if such an action lay, the agency would be directly injected into the defense of the reparations case, as respondent in the review action brought by the carrier. And since the principal issues of the enforcement action would normally be finally determined in the review proceeding, the shipper would effectively be deprived of the procedural advantages that Congress gave him in the enforcement action. The provision for an enforcement action would become a dead letter, and Congress' careful distinction between reparations and other orders would disappear.

If, on the other hand, the carrier is limited to defending the enforcement action, it still may obtain plenary judicial review of the validity of the repara-

⁴ For example, the Board's order (no longer in issue) directing Flota to grant Consolo reefer space.

tions order. The enforcement action is designed as a single trial and appeal procedure in which all of the issues relevant to the enforceability of the order may be determined fairly and expeditiously.

II

A different result is called for, however, where the carrier seeks to set aside the agency's reparations order, not in an independent review proceeding, but by way of defense to a review proceeding brought by the shipper to increase the amount of reparations awarded by the agency. The shipper's petition properly invokes the jurisdiction of the reviewing court; and ancillary jurisdiction to set aside the order in its entirety at the urging of the carrier is supported by considerations of procedural economy and fairness, and not opposed by the policies of the Shipping Act.

III

Turning to the merits, we note that whether or not it is ever permissible for the Maritime Commission to decline to award reparations in a case where it has adjudged the carrier guilty of a law violation causing injury to the complaining shipper, here the Commission, finding that the equities did not justify withholding reparations, awarded reparations to Consolo. The court of appeals erred in holding that this finding was unsupported by substantial evidence. Flota took a calculated risk in disregarding prior Board decisions indicating that its treatment of Flota would be unlawful; the Board acted promptly to determine

the legality of Flota's conduct; and, in sum, the equitable factors pointed toward granting, not withholding, reparations.

ARGUMENT

I

IN GENERAL, A CARRIER MAY NOT BRING A PROCEEDING TO REVIEW A REPARATIONS ORDER OF THE MARITIME COMMISSION; IT MAY OBTAIN JUDICIAL REVIEW OF SUCH AN ORDER ONLY BY WAY OF ASSERTING THE ORDER'S INVALIDITY IN A SHIPPER'S ACTION TO ENFORCE IT

A. Introduction and Background

We think it will promote clarity to preface this part of our argument with a brief discussion of (1) the relationship of the present issue to that of a pending case in this Court dealing with reparations orders of the Interstate Commerce Commission, and (2) the nature and structure of a typical reparations proceeding as defined by statute and agency practice.

1. THIS JURISDICTIONAL QUESTION IS IDENTICAL TO THAT PRESENTED BY REPARATIONS ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Section 1336 of the Judicial Code and Section 31 of the Shipping Act provide that actions to enforce or set aside orders of the Interstate Commerce and Federal Maritime Commissions, respectively, shall be brought in the federal district courts. However, Section 16(2) of the Interstate Commerce Act and Section 30 of the Shipping Act provide that reparations orders may be enforced by damage actions brought

in State or federal district courts by the beneficiary of the award (normally, a shipper) against the person directed to pay (normally, a carrier). In our brief in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, No. 14, this Term, we contend that Section 16(2) provides the exclusive method of reviewing ICC reparations orders, and that the carrier may not challenge such an order by bringing a Section 1336 proceeding to set it aside; in view of the substantial identity of the relevant statutory provisions, the fact that the provisions relating to Maritime Commission orders were modeled on those relating to ICC orders, the close parallel in the policies and procedures of the two agencies, and the absence of considerations requiring a different result, we reach the same conclusion with respect to the Maritime Commission's orders.

We need pause only briefly to consider the argument that the Hobbs Act, passed in 1950, dictates a different result in this case from *Atlantic*. Congress provided in Section 2(c) of the Act that actions to enjoin or set aside orders reviewable under Section 31 of the Shipping Act should henceforth be brought in the federal courts of appeals rather than the federal district courts. The court below reasoned that the Hobbs Act expressed a congressional purpose to make all Maritime Commission orders, including reparations orders, reviewable in the same fashion—that is, by a review proceeding in the appropriate court of appeals. This reasoning ignores both the policy and the clear language of Section 2(c).

(1) In providing for direct review of agency action in the courts of appeals rather than the district courts, Congress had three objectives in mind: first, to eliminate the necessity of having two trial-type proceedings, one before the agency and the other before the court, "thus going over the same ground twice"; second, to eliminate the requirement of three-judge district courts for the review of administrative orders; and third, to eliminate the right of direct appeal from the reviewing court to this Court and to substitute discretionary certiorari review. S. Rep. No. 2618, 81st Cong. 2d Sess., pp. 4-5; H. Rep. No. 2122, 81st Cong., 2d Sess., pp. 3-4.

None of these considerations applies to the review of reparations orders. Where review of such orders is available at all, it is in a one-judge district court with no right of direct appeal to this Court. *United States v. Interstate Commerce Commission*, 337 U.S. 426. And shifting such review to the courts of appeals could not avoid two proceedings: if a reparations order is upheld on review, it must still be enforced in a separate district court enforcement action brought by the shipper.

(2) Congress did not provide in Section 2(c) that *all* Commission orders would be reviewable in the courts of appeals—only those formerly reviewable under Section 31 of the Shipping Act. In merely substituting court of appeals for district court review of such orders, Congress did not enlarge the scope of that section. Hence, the true inquiry is whether reparations orders are within the scope of Section 31.

This question—on which the Hobbs Act sheds no light—is the same^{*} as whether 28 U.S.C. 1336 embraces actions to set aside ICC reparations orders.

Accordingly, in the following discussion, we will in the main be using such general terms as “the agency” (meaning either the Maritime Commission or the ICC), “the enforcement action” (meaning a shipper’s suit, either under Section 30 of the Shipping Act or under Section 16(2) of the Interstate Commerce Act, to enforce the agency’s reparations order), and “the direct review action” (meaning an action brought by the carrier, either under Section 2(c) of the Hobbs Act or under 28 U.S.C. 1336, to set aside the agency’s order). Where there is a material difference between the powers or procedures of the two agencies, we will of course so indicate. We emphasize that in this part of our brief we are concerned with the question whether the carrier has a general right to sue to set aside a reparations order, not whether the carrier may attack the validity of such an order in a proceeding, in which it intervenes, brought by the shipper to review the adequacy of the order. We postpone to a later section of the brief the contention that, though it lacks the general right, the carrier does have this more limited right.

^{*}The “except as otherwise provided” clause in Section 31 of the Shipping Act does not add to or subtract from the jurisdiction of the reviewing court over Maritime Commission as compared to ICC orders; the clause was designed merely to broaden venue in Maritime Commission cases. H. Rep. No. 659, 64th Cong., 1st Sess., p. 34; S. Rep. No. 689, 64th Cong., 1st Sess., p. 14.

2. THE NATURE OF A REPARATIONS PROCEEDING

Suppose that a shipper feels that he has been injured by reason of a common carrier's breach of its statutory duties. If efforts at informal redress are not successful, he may file a formal complaint with the agency against the carrier.⁶ The action on the complaint proceeds much like an ordinary civil damages action. The shipper bears the burden of prosecution and the carrier of defense. Agency personnel normally do not assist either party in the conduct of the proceeding or take an independent position.⁷ All the agency provides is the tribunal—in effect, a specialized court—for adjudicating the controversy

⁶Section 22 of the Shipping Act provides: "Any person may file with the Federal Maritime Board a sworn statement setting forth any violation of this chapter by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby. * * * The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." Section 13(1) of the Interstate Commerce Act provides: "Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to" the ICC. And Section 16(1) provides: "If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

⁷Though the public counsel section of the Maritime Commission, at least, may participate in the liability (as opposed to damages) phase of the proceeding in a case where the liability question is of general importance.

between the parties. When the trial phase of the proceeding is over, the agency renders its judgment. It either finds that the carrier acted unlawfully and that the shipper was injured thereby, and enters an order directing the carrier to pay reparations representing the shipper's damages, or it denies reparations.

If reparations are denied, or granted in a smaller amount than the shipper claimed, he may bring a direct review proceeding (under 28 U.S.C. 1336 or Section 2(c) of the Hobbs Act, as the case may be) in the appropriate forum to set aside the order of denial, or to set aside in part (on the ground that it is inadequate) the order granting reparations. *United States v. Interstate Commerce Commission*, 337 U.S. 426; *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839. If the agency awards reparations, its order, unlike other orders issued by the agency (e.g., an order prescribing a rate for the future), is not enforceable by the agency itself;^{*} nor is there any direct sanction applied to the carrier if it fails to obey. The carrier is thus under no compulsion to pay the

^{*} Section 29 of the Shipping Act provides: "In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process". Section 16(12) of the Interstate Commerce Act provides similarly with respect to ICC orders.

award unless and until the shipper brings an enforcement action under Section 30 of the Shipping Act or Section 16(2) of the Interstate Commerce Act. This action is a specialized proceeding not applicable to other orders. It must be brought within one year of the date of the agency's order.⁹ The shipper has a broad choice of venue. Moreover, if he chooses a federal district court, he is not liable for costs (except as they accrue on his appeal), he is entitled to a reasonable attorney's fee (paid by the carrier) if he prevails, and, in addition, the agency's findings and order are *prima facie* evidence of the facts determined therein. The action may also be brought in a State court of general jurisdiction, although the plaintiff is not there entitled to all the same special procedural advantages.

Underlying the distinct court procedures established by Congress is a basic difference between reparations orders, which provide a retrospective, damages-type remedy, and other orders of the agency, which provide prospective relief. To be sure, as the present case illustrates, the same proceeding, involving a single practice, may result in both a reparations order and an order prescribing future conduct. But the orders are distinct. The former adjudicates only the past lawfulness of the conduct, awarding damages for any injury inflicted; it has no continuing significance after the expiration of the one-year period allowed for enforcement. The latter determines the current and future legality of the practice.

⁹ See Section 16(3) of the Interstate Commerce Act; Section 30 of the Shipping Act.

Where the problem is one of prescribing or regulating the practices of carriers for the future, the agency plays an affirmative role in fashioning an order and enforcing it. But where the problem is to make whole a shipper injured by what the carrier did in the past, the agency plays a more passive role. It provides the tribunal to determine in the first instance whether the shipper is entitled to damages, but it is up to the shipper both to prosecute the action before the agency at his own expense and to secure enforcement of the agency's order. For the primary task of a regulatory agency is to guide and direct the practices of the businessmen subject to its jurisdiction. It is only secondarily concerned with redressing the injuries that businessmen may sustain by reason of violation of the statutes it administers. The problem of redress is more in the nature of a private dispute between shipper and carrier, though it arises within the general framework of the agency's responsibilities. The agency merely "affords a private administrative remedy" for "violation of the private right" to redress created by the Interstate Commerce Act or the Shipping Act. *Federal Trade Commission v. Klesner*, 280 U.S. 19, 26; see *id.*, pp. 26-27, n. 3; *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 268-269. Whether a particular shipper was overcharged under a rate no longer in effect is plainly less significant, in terms of the agency's responsibility for regulating commerce in the public interest, than whether a particular rate should be approved that will govern all shippers now and for an indefinite

period in the future. This is the reason why reparations orders of the ICC, where reviewable at all in a direct review proceeding, are reviewable before a single federal district judge, not, as in the case of other orders, by a three-judge court. *United States v. Interstate Commerce Commission*, 337 U.S. 426; see 28 U.S.C. 2321, 2325.

In placing on the shipper full responsibility for enforcing reparations orders, Congress was not unaware that shippers as a class are weaker than carriers, and hence likely to be at a disadvantage in a proceeding where the shipper stands alone, unassisted by the agency; and that the typical reparations claim is too small to warrant expensive enforcement proceedings. To make it feasible for the shipper to enforce such orders, Congress provided him with significant procedural "breaks" in the enforcement action—especially choice of venue, a reasonable attorney's fee if he won, and the use of the agency's findings and order to prove his *prima facie* case.¹⁰ The small shipper can, in consequence, usually sue in his home district; and if his cause is meritorious, obtaining a judgment should not be an expensive, protracted or uncertain undertaking for him, since he can recover the costs of litigation and need not prove the facts

¹⁰ This Court has observed that Section 16(2) is designed to discourage "harassing resistance by a carrier to a reparation order" (*St. Louis & S.F.R.R. v. Spiller*, 275 U.S. 156, 159). See, also, *Baldwin v. Milling Co.*, 307 U.S. 478.

already found in the agency proceeding.¹¹ But for these procedural assists to the shipper, the agency might have to assume enforcement responsibility for reparations orders itself, thereby impeding it in the performance of its more important regulatory functions.

The careful statutory design for the enforcement of reparations orders would be seriously disrupted if the provisions for direct review of agency orders¹² were construed to permit the carrier to sue to set aside a reparations order.¹³ As we show presently, the posi-

¹¹ To bring an enforcement action under Section 16(2) of the Interstate Commerce Act, it is not necessary that a shipper have participated in the agency proceeding or been named in the reparations order. *Phillips v. Grand Trunk W. Ry.*, 236 U.S. 662. In addition, under both Acts, other shippers besides the one bringing the enforcement action may be joined as plaintiffs, and any additional carriers charged under the reparations order may be joined as defendants regardless of their place of residence. See Section 30 of the Shipping Act; Section 16(4) of the Interstate Commerce Act.

¹² Section 2(c) of the Hobbs Act (formerly Section 31 of the Shipping Act), in the case of Maritime Commission orders, and 28 U.S.C. 1336, in the case of ICC orders.

¹³ We have explained at length in our brief in the *Atlantic Coast Line R. Co.* case, No. 14, this Term, that the legislative history of 28 U.S.C. 1336 and its predecessor provisions (on which Section 31 of the Shipping Act was modeled) discloses no intent to include reparations orders, traditionally governed by the distinct enforcement procedure; and that until very recently it was well understood that in fact such orders were not reviewable under these provisions. We do not repeat

tion of the court below, which would assimilate reparations orders to other agency orders for purposes of direct review actions, (1) produces anomalous and inequitable results, while (2) no such results follow from denying the carrier a right of direct attack upon such orders.

B. The position of the court below is inconsistent with the congressional language and intent

1. Our major focus is on considerations of policy. But we pause to note that the position of the court below (that a carrier may sue to set aside a reparations order) is not even consistent with the language of the statute. It makes nonsense of the provision that gives reparations orders *prima facie* effect in the enforcement action. Suppose that a carrier were permitted to bring a proceeding to set aside a reparations order, and did so but lost. It would be anomalous to give the agency's order—upheld by the reviewing court—only *prima facie* effect in a later action by a shipper to enforce the order. If permitted to sue directly to set aside a reparations order, surely the carrier should be deemed bound by the determination of the reviewing court which it invited, and the order, therefore, given conclusive effect in any later enforcement action. But this result

these arguments here, but instead concentrate on showing (1) that deeming such orders included would disrupt the delicate machinery established by Congress to distinguish reparations from other kinds of proceedings, and (2) that the enforcement action provides a wholly adequate procedure wherein the carrier may challenge the validity of the agency's orders. We emphasize these points here because they are vigorously argued in the Brief of the Respondents in the *Atlantic* case.

seems barred by the language of the enforcement statutes, which speak of *prima facie*, not conclusive, effect. That leaves the manifestly unacceptable alternative, which Congress could not have intended, of permitting the carrier to rebut anew the court's decree upholding the agency. Such a procedure would in effect give the carrier two proceedings to review the same issues.

2. If a carrier were permitted to bring a direct review action to challenge a reparations order, theoretically, at least, the shipper would not need to participate in the action. He could rely on the agency to defend the order, and then, if the order was upheld, institute (or resume—see p. 27, *infra*) his action to enforce it. As we have seen, however, the interest in granting redress to injured shippers is considered primarily a matter of concern to the private parties involved, rather than of sufficient public interest to require participation by the agency as a party. Congress sought to relieve the agency of responsibility for enforcing such orders, in contrast to those having a general and continuing significance, which are enforceable by the agency and which, all agree, are subject to challenge in direct review proceedings. In view of the attenuated nature of the agency's interest, a shipper awarded reparations might well conclude that he must participate in the carrier's direct review action to protect his interest, rather than rely exclusively on what perhaps might be a *pro forma* defense by the agency.

There is an inescapable dilemma here. Either the agency assumes complete responsibility for the de-

fense of reparations orders, in which event the congressional design to keep the agency out of direct involvement in the enforcement of such actions is destroyed,¹⁴ or the agency does not assume such responsibility and the shipper is thereby compelled to intervene¹⁵ in the direct review action, with the result (as now we demonstrate) that the enforcement action, with its special procedural advantages for shippers, becomes a dead letter.

Assuming that the shipper will ordinarily deem it necessary or prudent to participate in the direct review action brought by the carrier, it will require not one action to enforce the order—as Congress provided—but two. In the first, ordinarily the crucial, action (intervention in the carrier's proceeding) the shipper is denied the advantages that Congress determined he needed to support the burden of enforcing a reparations order. The choice of venue is not his, but the carrier's;¹⁶ this might be a source of real hardship

¹⁴ It seems particularly incongruous to award the shipper his attorney's fees in the enforcement action when the real burden of enforcement is assumed not by the shipper but by the agency in defending the reparations order in the carrier's direct review proceeding.

¹⁵ As he may as a matter of right. 28 U.S.C. 2323; 5 U.S.C. 1038.

¹⁶ 28 U.S.C. 1398, which governs the venue of direct review actions brought under 28 U.S.C. 1336, would permit the carrier to sue in the district of its residence or principal office—which might, of course, be remote from the shipper's home district. The venue provision under the Hobbs Act, 5 U.S.C. 1033, would permit the carrier bringing a direct review proceeding to sue in the circuit of its residence or principal place of business or in the District of Columbia.

for the small, localized shipper. Moreover, in the first action the shipper is not excused from costs, and he is not entitled to any attorney's fee if he prevails; this would likely deter most shippers from pressing their typically modest claims. And even if the order is upheld, the carrier need not pay; the shipper must still bring an enforcement action to collect. The process of enforcement thus becomes far more onerous than Congress contemplated. This multiplication of burdens destroys the balance between shipper and carrier that Congress struck when it placed on the shipper himself the full responsibility for enforcing reparations orders.

The irrationality and unfairness of the double enforcement procedure that the court below sanctioned is underlined by the fact that there is no time limit on bringing a direct review proceeding to challenge an ICC order. Cf. 28 U.S.C. 1336(c).¹⁷ A carrier could bring such a proceeding while the shipper's enforcement action was *in medias res*, thereby disrupting the action and delaying its completion by forcing the shipper to defend the order in a separate action in perhaps a far distant forum.

The only way the shipper could avoid the burden of two separate proceedings to obtain enforcement would be by counterclaiming for damages in the

¹⁷ There is a 60-day limit in the case of Maritime Commission orders. See Hobbs Act, § 4.

direct review proceeding.¹⁸ If the shipper thus is forced to bring his enforcement action in the direct review court, the practical result is that the enforcement action is instituted not by the shipper but by the carrier. The choice of timing and venue is the carrier's, not the shipper's. Under such a procedure, the enforcement action carefully provided by Congress is read out of the statute.

C. Limiting the Carrier to Defending in the Enforcement Action Fully Protects Its Right to Judicial Review

We have tried to show that permitting the carrier to bring a proceeding to set aside a reparations order would be contrary to the congressional design in establishing special procedures for the enforcement of such orders. To complete our argument, it is necessary to show that the carrier can obtain complete judicial review of the reparations order in the enforcement action. For it would not be tenable to impute to Congress an intent to deny the carrier such review altogether, which would be the result if the carrier could not bring a direct review proceeding and could not raise in the enforcement action all defenses he may have to the order, including the defense that the order is invalid because the agency's finding of

¹⁸ Even this option may not be open in the case of Maritime Commission orders. Any direct review proceeding would, by virtue of Section 2(c) of the Hobbs Act, have to be brought in a court of appeals; and the courts of appeals do not have jurisdiction to entertain enforcement actions or award damages. It seems doubtful that principles of ancillary jurisdiction (see pp. 38, 39, *infra*) would support permitting a counterclaim for damages to be maintained in a court of appeals.

illegality was erroneous in law or unsupported by substantial evidence.

We think it is plain that the carrier is entitled to complete judicial review of the reparations order in the enforcement action. We show (1) that this Court, without expressly deciding the point, has consistently so assumed, and (2) that the enforcement action provides an entirely appropriate forum for the carrier to challenge the validity of the reparations order.

1. This Court has stated unequivocally that the enforcement action is a "one-judge trial and appeal procedure" (*United States v. Interstate Commerce Commission*, 337 U.S. 426, 443) which provides the carrier with "complete judicial review of adverse reparation orders" (p. 435). To the same effect, see *Meeker & Co. v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430; *H. K. Porter Co. v. Central Vermont Ry.*, 366 U.S. 272, 274, n. 6; and *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.A. 2), the last applying this principle to enforcement actions based on Maritime Commission orders. Neither *Pennsylvania R. Co. v. United States*, 363 U.S. 202, nor *Mitchell Coal Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, are inconsistent with these statements of this Court. In the former case, the carrier had brought a damages action against the United States (the shipper) in the Court of Claims. As required by primary-jurisdiction principles (see, e.g., *United States v. Western Pac. R. Co.*, 352 U.S. 59), the court referred the question of whether the carrier had violated the

Interstate Commerce Act to the ICC. This Court held that the Commission's determination of this question was judicially reviewable. The next issue for the Court was where the determination was reviewable. Since it was settled that the Court of Claims had no jurisdiction to review it (see *United States v. Jones*, 336 U.S. 641),¹⁹ the only alternative, and the one adopted by the Court, was to permit the carrier to bring a direct review proceeding to set the order aside. We shall show that in the present case, in contrast, there is no obstacle to review in the enforcement court. Moreover, as we have noted, the congressional objectives in establishing the distinctive reparations procedure can be achieved only by limiting review to the enforcement court.

Mitchell Coal Co. v. Pennsylvania R.R. Co., 230 U.S. 247, did not hold—as respondents in the *Atlantic Coast Line* case, taking language of the Court out of context, maintain²⁰—that the enforcement court cannot review the agency's determination underlying the reparations order. In *Mitchell*, no reparations order had been entered by the Commission. The shipper, without any prior administrative finding that the carrier had charged an illegal rate, sued the carrier directly for damages.²¹ Under settled principles, the

¹⁹ This is no longer true. See p. 35, *infra*.

²⁰ See Brief for Respondents, No. 14, this Term, pp. 22-23.

²¹ Section 9 of the Interstate Commerce Act provides that any person "claiming to be damaged by any common carrier subject to the provisions of this chapter may", as an alternative to filing a complaint with the Commission under Section 13(1), "bring suit in his * * * behalf for the recovery of the damages for which such common carrier may be liable under the pro-

damages court could not itself determine in the first instance whether the rate was unreasonable. That was an issue within the Commission's primary jurisdiction. It was in this context that the Court termed the administrative determination of unreasonableness "conclusive" (p. 258). Plainly, the Court meant "conclusive" in the sense that a district court could not redetermine *de novo* the reasonableness of a rate or hear evidence on the point, as it might with respect to issues not within the primary jurisdiction of the agency. Since the suit was not one to enforce an agency order, *Mitchell* did not involve the issue whether an enforcement proceeding is an appropriate method of judicial review of the underlying administrative determination. As we have seen, this Court has assumed that it is; next, we show that the assumption is well founded.

2. No feature of the enforcement action is inconsistent with the inference that Congress intended it as the exclusive method whereby the carrier could challenge the validity of a reparations order. It is well adapted to provide complete judicial review of such orders.

(a) Although, under what we believe is the proper procedure, the carrier is not permitted to take the

visions of this chapter in any district court of the United States of competent jurisdiction". In such an action, the court must normally make reference to the ICC for a determination of whether the Act has in fact been violated (*United States v. Western Pac. R. Co.*, *supra*), as in similar actions in the Court of Claims involving the United States as a shipper (e.g., *Pennsylvania R. Co. v. United States*, *supra*).

initiative in seeking review of a reparations order, the shipper must bring an enforcement action within one year of the agency's order or lose all right to enforce it (see p. 20, *supra*). This ensures that the carrier will receive reasonably prompt judicial determination of his liability under the order. And he incurs no penalty for failing to comply with the administrative order in the meantime.

(b) Review in an enforcement action is before a single district judge. If the carrier were permitted to bring a direct review action to challenge an ICC reparations order, such action would also be brought before a single federal district judge, not a three-judge court as in the case of other orders. See p. 21, *supra*. Thus, an enforcement action provides the same kind of review as is normally available in challenging orders of this sort. In the case of reparations orders of the Maritime Commission, to be sure, any direct review proceeding would have to be brought in a court of appeals, whereas enforcement actions lie in the district court. But the district court's judgment in the enforcement action would be reviewable by a court of appeals. So, in either case, the carrier would be able to obtain court of appeals review of the agency's determination.

The fact that enforcement actions may also be brought in State courts of general jurisdiction may seem more troublesome. However, such State-court actions seem to be rare, probably because the shipper does not enjoy all of the special procedural advantages (see p. 20, *supra*) unless he sues in a federal

district court. In addition, such actions would appear to be removable in every case to the nearest federal district court at the carrier's option.²² There is in any event no anomaly in permitting a State court to review ICC or Maritime Commission determinations. State courts are often empowered to enforce federal rights of action. See, *e.g.*, 45 U.S.C. 56 (Employers' Liability Act). No issue is presented here of the power of a State court to set aside a federal agency's order; no such power is granted the enforcement court (see *infra*, this page). Further, since reparations orders involve only past practices, State-court jurisdiction to review such orders is unlikely to create disorder in the federal regulatory scheme, especially since any federal question decided in a State enforcement action is reviewable by this Court.

(c) Although we think that the enforcement court is empowered to declare the agency's reparations order invalid as between the parties to the action, it cannot, in our view, set aside the agency's order. This power is, under the governing statutes, granted only

²² 28 U.S.C. 1441(a), providing that "except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending", seems clearly to permit removal of the State-court enforcement action. Cf. 28 U.S.C. 1445.

the direct review court.²³ If it were also enjoyed by the enforcement court, not only would the agency—contrary to the congressional intent—be brought in as a respondent (see pp. 25–26, *supra*), but other shippers entitled to take advantage of a reparations order would be foreclosed in a case where the first shipper who sued was inadequately represented and for that reason lost his case (see p. 42, *infra*).²⁴

Although the result of barring the enforcement court from setting aside a reparations order is to expose the carrier to the possibility of a succession of shipper's actions arising from a single order, no instance has been suggested where a carrier was actually subjected to a burdensome multiplicity of

²³ In addition, under 28 U.S.C. 1336(b), the district court in a damages action brought directly by the shipper against the carrier, without benefit of any administrative reparations order, has jurisdiction to set aside the order of the agency determining the liability of the carrier on reference from the same court (see n. 21, pp. 30–31, *supra*, and p. 35, *infra*). This would indicate that the enforcement court in an action to enforce a reparations order, not having been granted any such power expressly, does not enjoy it.

²⁴ This danger would not arise in the case of a damages action brought by the shipper against the carrier directly (*i.e.*, without the shipper's first obtaining a reparations order from the agency), where 28 U.S.C. 1336(b) authorizes the damages court to set aside the agency's determination made on reference from the court. Such determination adjudicates the rights specifically of the parties to the damages suit, and could in no event provide a basis for other shippers to sue upon.

such actions.²⁵ At all events, there is nothing novel or unfair in the notion that a law violator may be subject to a plurality of lawsuits arising from a single wrong, if the wrong injures more than one person. Indeed, Section 9 of the Interstate Commerce Act permits shippers to sue carriers for damages without first going to the agency for a reparations order (in such a case, the court where the suit is brought refers to the ICC the question whether the carrier acted illegally), and 28 U.S.C. 1336(b) provides that in such actions the damages court is the only court that can review the validity of the agency's determination.

Nor is there any appreciable danger to uniformity in the rights and obligations of shippers if no court may set aside an agency reparations order. Such orders are not addressed to current or future condi-

²⁵ In the case of ICC orders, the position of the court below would be just as likely to lead to a multiplicity of suits. It is frequently the case that a single joint rate charged a large shipper gives rise to a reparations order against a number of different carriers. If the position of the court below were sustained, in such situations each carrier could bring a separate suit to set aside the agency's order. It should be noted that in the case of Maritime Commission orders, this particular danger would be obviated by the provisions of 28 U.S.C. 2112(a), which requires consolidation in a single court of appeals of multiple review proceedings arising from a single agency order. This provision does not apply, however, to district court review proceedings, as in ICC cases. See 28 U.S.C. 2112(d).

tions and do not require any shipper or carrier to take or refrain from any action. They simply create a right to recover damages for past harms. Moreover, the enforcement court has no power to determine, even for the past, the rights and duties of the parties, but is limited to reviewing the findings and conclusions of the agency to ensure that they are in conformity with law and supported by substantial evidence.²⁶

(d) There is no unfairness in the fact that, to obtain judicial review of a reparations order, the carrier must risk a proceeding in which Congress has given the shipper a distinct procedural edge. If the carrier indeed has a meritorious defense, he will not be liable for the shipper's attorney fee, and the only disadvantage under which he labors (besides costs) is that the venue of the action is selected by the shipper.²⁷ This simply recognizes that, since the shipper is in general apt to be more localized and the carrier more dispersed in its operations, it is fair that the carrier should be required to defend in a forum convenient to the shipper, rather than vice versa. That the carrier must pay a reasonable attorney's fee to the shipper

²⁶ Although new evidence may be introduced in the enforcement action, it is limited to issues *not* within the primary jurisdiction of the agency. *Mitchell Coal Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 258.

²⁷ The fact that the agency's order is *prima facie* evidence of the facts found by the agency would not appear a significant disadvantage from the carrier's viewpoint, since in a direct review proceeding the court would be required to uphold the agency's findings if they were supported by substantial evidence.

if the shipper wins should encourage carriers to comply with agency reparations orders where they have no meritorious defense; it will not discourage them from raising such defenses.

II

WHERE THE SHIPPER BRINGS A DIRECT REVIEW PROCEEDING CHALLENGING THE ADEQUACY OF THE AGENCY'S REPARATIONS ORDER, AND THE CARRIER INTERVENES AND CONTENDS THAT THE ORDER SHOULD BE SET ASIDE, THE REVIEWING COURT HAS JURISDICTION TO SET IT ASIDE

For the reasons already stated, we think a carrier may not bring a direct review proceeding to set aside a reparations order. But the court of appeals' jurisdiction to set aside the order in this case may be sustained on a narrower ground, to which the court below alluded: that where the shipper brings a direct review proceeding, as he is entitled to do, contending that the reparations order is inadequate, and the carrier intervenes and contends that the order is invalid and should be set aside in its entirety, the reviewing court has jurisdiction to pass upon the latter contention. In such a case, as the court below stated, "the order should be reviewable in its entirety, and the rights of all parties considered" (R. 661).

A. The jurisdiction of the reviewing court having been properly invoked by the shipper, an independent basis of jurisdiction is not necessary to enable the court to entertain the carrier's challenge to the validity of the order

By its order of March 28, 1961, the Board awarded Consolo reparations for Flota's discriminatory re-

fusal to grant him a fair share of banana cargo space, but in an amount less than he had claimed. Consolo petitioned the court below under Section 2(c) of the Hobbs Act to set aside so much of the Board's order as denied reparations in the larger amount which he claimed and to direct the Board to enter an order for such larger amount. This petition by the shipper challenging the reparations award as inadequate properly invoked the jurisdiction of the court of appeals. See *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839; *Swift & Company v. Federal Maritime Commission*, 306 F. 2d 277 (C.A. D.C.); *States Marine Lines, Inc. v. Federal Maritime Commission*, 313 F. 2d 906 (C.A. D.C.), certiorari denied, 374 U.S. 831; cf. *United States v. Interstate Commerce Commission*, 337 U.S. 426.

Flota, which had been a respondent in the proceedings before the Board, intervened in Consolo's review proceedings in the court of appeals, contending that the award was invalid and should be set aside in its entirety (R. 652-653). Since Flota was a "party * * * in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended" (Section 8 of the Hobbs Act, 5 U.S.C. 1038), its intervention in Consolo's review proceeding was "as of right" (*ibid.*). In cases where "intervention is a matter of right, the intervenor's claim is ancillary to the pending action, and jurisdiction over the principal action sustains jurisdiction over this ancillary

claim.”²⁸ Indeed, the present case is a *fortiori* to those holding that jurisdiction over the main cause supports jurisdiction over a compulsory counterclaim that lacks an independent ground of jurisdiction;²⁹ an affirmative award may be made on a counterclaim, while here Flota was merely defending against the award granted Consolo.³⁰

B. Considerations of procedural economy and fairness support application of the ancillary-jurisdiction doctrine here; the policies which we have argued make the enforcement action normally the exclusive method of reviewing reparations orders are not opposed

Where the shipper brings a direct review proceeding attacking the adequacy of the agency's reparations award, occasionally the court of appeals may, in passing on his contention, directly or by implication rule that he is entitled to no reparations whatever. Suppose, for example, that the shipper argued that the carrier had overcharged him by two cents a barrel, rather than one (as the agency had found), and the court concluded that in fact he had not been overcharged at all; the shipper probably would be

²⁸ 1 Moore, *Federal Practice* (2d ed.), p. 824; 4 id., § 24.18; *White v. Ewing*, 159 U.S. 36; *Moore v. New York Cotton Exchange*, 270 U.S. 593; *Eichel v. United States Fidelity & Guaranty Co.*, 245 U.S. 102; *Lenz v. Wagner*, 240 F. 2d 666 (C.A. 5); *Park & Tilford v. Schulte*, 160 F. 2d 984 (C.A. 2).

²⁹ See, e.g., *Moore v. New York Cotton Exchange*, *supra*.

³⁰ In addition to intervening as of right in the proceeding brought by Consolo, Flota filed its own petition to review and set it aside. We do not think, however, that a separate petition was necessary to raise the defense of invalidity and confer jurisdiction on the court to set the reparations order aside in its entirety.

barred by *res judicata* from bringing an enforcement suit based on the reparations order. Generally, however, issues of damages raised in a shipper's action to increase the award can—as in the present case—be determined without completely foreclosing the shipper from seeking damages in an enforcement action. And in that event barring the carrier from challenging the validity of the reparations order in the direct review proceeding produces an unnecessary and undesirable fragmentation of judicial review.

Fundamental considerations of judicial economy require that, if possible, all of the issues arising from a single transaction between the same parties be decided in one proceeding, not several. This is the premise of rules allowing counterclaims and pendent and other forms of ancillary jurisdiction. While it might be possible to decide reparations review proceedings in two stages—the first concerned with whether the agency's award should be increased, and the second with whether the award should be decreased or denied altogether—the division is highly artificial. It is simpler, more practical, more expeditious, and more efficient to review the order, not piecemeal, but in a single proceeding.

A similar principle of economy underlines 28 U.S.C. 1336(b), which provides that in a damages suit, where a reference must be made to the Interstate Commerce Commission, the damages court shall have exclusive jurisdiction to review the order of the Commission arising from the reference. Prior to the enactment of this provision, as illustrated by *Pennsyl-*

vania R. Co. v. United States, 368 U.S. 202, *supra*, pp. 29-30, a party to the damages suit desiring judicial review of the Commission's order was required to bring a separate review proceeding. This procedure was cumbersome and duplicative, and Congress changed it. The same policy justifies applying the traditional doctrine of ancillary jurisdiction to the situation presented by the instant case.

If precluded from challenging the validity of the reparations order in a direct review proceeding brought by the shipper, the carrier must defend itself against the order in two separate judicial proceedings. First, it must intervene in the shipper's direct review proceeding. Otherwise it may later be confronted in the enforcement action with a reparations order in an amount larger than that originally entered by the agency. But if the carrier defends successfully in the direct review action, that will ordinarily mean only that it has succeeded in holding the line at the amount of reparations awarded the shipper by the agency. It must still defend against the order in an enforcement action brought by the shipper. Absent strong reasons, it seems improper to subject the carrier to this redundant defensive procedure.

No strong reasons are apparent; the considerations of policy that led us to urge that the carrier is not permitted to institute a direct review proceeding to challenge a reparations order are not applicable here. Congress has conferred special procedural advantages upon the shipper only with respect to an action to enforce the reparations order issued by the agency,

not in actions to obtain a greater award than the agency deemed justified. Concededly, if the shipper is dissatisfied with the agency's order, and desires to have the amount of the award increased, he must, before instituting the enforcement action, bring a direct review proceeding challenging the adequacy of the order. It is not a substantial added burden upon him to defend the validity of the order in the proceeding he has brought, as well as attack its adequacy.

In an enforcement action, the only parties are the shipper and the carrier; therefore, the court's finding that the reparations order is invalid is binding only on the parties. Other shippers are free to sue the carrier on the order. *Phillips v. Grand Trunk W. Ry.*, 236 U.S. 662, 665; *Mitchell Coal Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 258. However, where the carrier's defense of invalidity is raised in a shipper's action to increase the reparations award, the agency is the respondent. Ordinarily, in a direct review (as contrasted with an enforcement) proceeding, the court sets aside the agency's order if it finds it invalid. We find no compelling reasons of policy for denying the reviewing court that power here. To be sure, if a reparations order is set aside, not only the shipper who brought the proceeding, but all other shippers in whose favor the order ran, would be precluded from enforcing it. But they would also be precluded from enforcing it if the one shipper succeeded in having it set aside as inadequate, so that such risk already inheres in the suit. No problem is presented of injecting the agency as a party in proceedings where it

properly should play a less active role. The agency is already in the case as a party: it is the respondent in the shipper's direct review proceeding. Finally, unless the carrier is able to get the order set aside (assuming he establishes its invalidity), he faces the prospect of a succession of shippers' review, as well as enforcement, actions.²¹

III

WHETHER OR NOT AN AWARD OF REPARATIONS IS ALWAYS MANDATORY WHERE A VIOLATION OF LAW IS FOUND AND DAMAGES PROVED, THE AGENCY'S AWARD OF REPARATIONS IN THIS CASE WAS JUSTIFIED AND THE COURT OF APPEALS ERRED IN SETTING IT ASIDE

A. Petitioner argues that the Maritime Commission has no discretion to deny reparations on equitable grounds; that where a violation is proved and damages shown, the injured party has an absolute right to a reparations order. It is not necessary to decide this question in the present case. Normally, of course, where damages are shown, reparations should be awarded; the purpose of the reparations procedure, after all, is to afford an administrative damages remedy to the injured party. However, petitioner himself appears to concede (Pet. 11) the propriety of an agency's denying reparations, in cases where retroactive application of a new rule of law would be harsh or inequitable, by simply declaring a practice unlawful for the future only. See, *e.g.*, *Johnston Seed Co.*

²¹ With respect to ICC—not Maritime Commission—orders. See n. 25, p. 35, *supra*.

v. *United States*, 90 F. Supp. 358 (W.D. Okla.), affirmed, 191 F. 2d 228 (C.A. 10); *Boston Wool Trade Ass'n v. Director General*, 69 I.C.C. 282, 309. We need not explore the outer bounds of the agency's discretion thus to withhold reparations on equitable grounds. For here the agency did award damages; and we submit that the court of appeals erred in holding that the agency's refusal to withhold damages on equitable grounds was unsupported by substantial evidence.

Although we believe that the court erred, we present only a brief statement of our views on the question. We have argued that the Commission in a reparations case was given the role of arbiter in a basically private controversy—that it was not meant to be a party to the controversy. The statutory scheme contemplates that the main burden of defending an agency reparations order shall be borne by the shipper. Applying that principle here, we leave the argument on the merits of the court of appeals' result to be made principally by petitioner.³²

B.1. When Flota agreed in May 1957 to the renewal of the exclusive contract, the Board had rendered two decisions involving the carriage of bananas by Flota's

³² Although the agency is a proper party here because this is a shipper's proceeding in which the carrier intervened and sought to have the reparations order set aside in its entirety (see pp. 42-43, *supra*), the issue on the merits has importance only to the particular private parties to the suit. Flota does not challenge the underlying validity of the Commission's order, but only the equities of granting this particular shipper, Consolo, reparations for Flota's concededly unlawful acts.

competitor, Grace Line, in the very same trade between Ecuador and North Atlantic ports—one in 1953, *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293, the other in April 1957, *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278. The Board had made a study of banana carriage in depth, and had held in these cases that a carrier could not pick and choose among qualified banana shippers.³³ Although it knew of these decisions, Flota was willing to take the risk of going ahead with its exclusive contract with Panama Ecuador for a three-year term.³⁴ Its

³³ The Board was applying the familiar doctrine that where demand for space exceeds the supply, the common carrier must equitably pro-rate the available space among the shippers. *Pennsylvania R.R. Co. v. Puriton Coal Co.*, 237 U.S. 121; *Patrick Lumber Co. v. Calmar SS. Corp.*, 2 U.S.M.C. 494.

³⁴ It is, of course, true that on review, the Second Circuit in 1959 reversed and remanded the Board's 1957 decision in *Banana Distributors* because it did not accept the test announced in the Board's report as the proper basis for holding Grace Line to be a common carrier of bananas (*Grace Line, Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711 (C.A. 2)). On remand, however, the Board reached the same result, 5 F.M.B. 615, and the court affirmed (*Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933). Moreover, Flota's protestations must be judged in the context of circumstances as they existed in May 1957, when it renewed the exclusive contract. At that time the agency with primary responsibility in the field had declared illegal the discriminatory exclusion of qualified banana shippers (R. 505). And there is nothing to indicate that Flota believed that the Board's 1957 decision was bad law and would be reversed. On the contrary, Flota began its defense before the Board by "assuming that the Grace Line decision is good, valid law, and we are not attacking that in any manner, shape, or form" (R. 134). Flota instead relied on the physical differences between its ships and Grace's in arguing to the Board that the *Grace Line* decision was not applicable to it. At all events, Flota was taking a "calculated

violation of law was thus a knowing one.³⁵

2. Flota refused to break its contract with Panama Ecuador and grant Consolo reefer space, not because of genuine concern that breach of the contract might lay it open to a suit for damages in the event the exclusive feature of the contract was held legal, but solely because of the advantages Flota believed the contract would provide. Flota's operating manager in the United States testified: "[I]t is better to deal with one [shipper] than with three"; he said Flota would have "to make more money" to overcome the disadvantages of dealing with three (R. 162). Flota's board of directors was eager to renew the contract with Panama Ecuador in May 1957 since, among other things, Flota had been able to settle Panama Ecuador's claims for shipment damage on a basis of only "2.4% which is a very low percentage in comparison with the usual 15% deduction which applies to this type of transportation" (R. 196). Flota's general manager testified that Flota had "had no difficulties or troubles whatsoever" under its 1955 exclusive contract with Panama Ecuador, and "consequently the

risk" that the Board's ruling in the *Grace line* case would be affirmed (R. 506). As between the innocent shipper who was injured by the carrier's discriminatory denial of space, and the guilty carrier, it was plainly no abuse of discretion to refuse the carrier's request to pass "the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof" (*ibid.*).

³⁵ The court below reasoned that Flota may well have thought that the Board's earlier decisions relating to the banana carriage were distinguishable. In any event, however, Flota plainly took a calculated risk that the Board and the courts would—as proved to be the case—find that they were *not* distinguishable from its case.

board of directors believed it very suitable, very convenient to extend the contract" (R. 434; see, also, Ex. 18, R. 195; Minutes No. 482, R. 198-199).

At all events, any legal dilemma Flota may have faced in having to decide whether to breach its contract with Panama Ecuador in order to serve Consolo was much less acute than the court below thought. By 1958, Flota had an independent ground for cancelling the contract. For in that year Panama Ecuador threatened to cancel unless Flota reduced its freight rates. Instead of terminating the contract at that time, as it could have done, Flota granted the requested reduction—though considering the request legally unjustified—because it thought that on balance it could make more money by continuing at reduced rates with Panama Ecuador than by opening its reefer space to other qualified shippers (R. 199-204, 499-500).

3. The court below reasoned that Flota, beset by justifiable doubts regarding its obligation, promptly sought a declaratory ruling from the Board and the Board unjustifiably delayed in issuing such a ruling; and, further, that regardless of the cause of the delay "it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion" (R. 697). The court plainly erred in holding that Flota could absolve itself of responsibility for illegally inflicting pecuniary injury on the shipper by pointing to alleged administrative delay.³⁰ But there was in any

³⁰ In analogous cases involving the Labor Board, it has been held that back pay may not be denied employees wrongfully discharged or refused employment, even though the reparations period included two and one-half years during which the Labor Board, "[u]nfortunately", was considering the case. *National*

event no unreasonable or unnecessary delay; and to the extent that there was delay, Flota bears much of the responsibility. Flota's petition for a declaratory order (R. 37) was not filed with the Board until October 30, 1957, more than five months after it had executed the renewal contract with Panama Ecuador in violation of the Shipping Act (R. 659, 687). Thus, as the Commission noted (R. 507), Flota in filing the petition was not requesting guidance as to the course of action it should pursue in light of the Board's April 29, 1957 *Grace Line* decision; it had already decided to act in disregard of that decision. The petition was filed, moreover, only after Consolo warned that he would file a complaint with the Board if a fair share of space was not granted him by November 15.

Labor Relations Board v. Electric Cleaner Co., 315 U.S. 685, 697-698. See, also, *National Labor Relations Board v. Pool Mfg. Co.*, 339 U.S. 577, *National Labor Relations Board v. American Creosoting Co.*, 139 F. 2d 193 (C.A. 6), certiorari denied, 321 U.S. 797; *National Labor Relations Board v. Wilson Line*, 122 F. 2d 809 (C.A. 3). So also, the injured shipper has been held entitled to reparations from the wrongdoing carrier even though the reparations period included some three and one-half years during which proceedings were pending before the Interstate Commerce Commission, and despite the fact that at one time during that period the Commission had ruled that no reparations should be assessed at all, a decision which the Commission reversed five years later. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Co.*, 269 U.S. 217. It is not necessary, in such a case, to establish that the carrier "benefited" from its illegal exclusion of the injured shipper. The carrier's liability arises from the wrongful loss inflicted upon the shipper, "not out of the unlawful receipt or unjust enrichment by the carrier" (269 U.S. at 234). See, also, *McLean v. Denver & Rio Grande R.R. Co.*, 203 U.S. 38; *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.A. 2), certiorari denied, 313 U.S. 582.

Flota's petition, filed two weeks before Consolo's complaint, raised many of the same legal and factual issues, and the Board was entitled to consolidate them for hearing. Moreover, as the Commission pointed out, even without consolidation Flota's petition "would have offered no promise of a speedy resolution of the controversy" (R. 508). The issues raised by the petition could be determined only after notice and a hearing. And, in filing and prosecuting its petition, Flota conceded nothing, requested a full hearing, and strenuously insisted that it was not a common carrier, that its exclusive contract was lawful, and that in any event the Board's *Grace Line* decision was inapplicable (R. 508). On this last point, Flota relied, among other things, on alleged structural differences between its vessels and Grace's which Flota claimed required it to deal with Panama Ecuador exclusively. This factual contention "led to a complex and lengthy hearing into the physical characteristics and utilization of [Flota's] vessels so far as the banana trade was concerned", and precluded "prompt disposition of the controversy" (R. 508).

Flota requested an extension of time to answer Consolo's complaint and additional time was granted (R. 49-52). On January 9, 1958, Flota acknowledged to the Board that Consolo's complaint "raises precisely the same issues which" Flota seeks "to have adjudicated in [its] petition" and asked the Board what action would be taken in connection with its petition (R. 56). On March 31, 1958, Consolo requested an early pre-hearing conference (R. 57). However, on

April 2, 1958, Flota asked to postpone the pre-hearing conference to the week of May 5 (R. 57-58). On April 4, 1958, Flota wrote the Board stating that an appeal was pending in the Second Circuit in the *Grace Line* case and "that [this] is a further reason why there should be a delay in *any* pretrial conference" (R. 61; emphasis supplied). The Board denied this request; had it granted it, there would have been at least a two-year delay in the disposition of the matter.

On May 1, 1958, the Board assigned a docket number to Flota's petition and consolidated it with Consolo's complaint (R. 63). The Board set the date of the hearing before the Examiner for September 22, 1958 (R. 65). (Flota was unwilling to proceed to hearing prior to September (R. 554-555).) On August 8, 1958, Flota applied for a postponement of the hearing to December 1, 1958 (R. 66), stating that such a postponement "cannot in any manner be detrimental to the interests" of Consolo (R. 68), but the Board granted postponement only to November 3, 1958 (R. 70). The Examiner's decision on the issue of violation (Recommended Decision of February 4, 1959, R. 17) was filed three weeks after he received the parties' briefs; the Board's decision (Decision of June 22, 1959) was filed six weeks after it heard oral argument (R. 509).³⁷

³⁷ Since the period for which reparations were assessed ended on July 12, 1959 (the date for compliance with the Board's order of June 22, 1959) and no interest was assessed, no prejudice resulted to Flota from the fact that the trial on the reparations issue did not take place until after June 1959.

4. The Commission observed that Flota "has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded" (R. 513). The Board could have assessed interest as damages from the time of the arrival of each vessel from which Consolo was unlawfully excluded. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Co.*, 269 U.S. 217. The Examiner so recommended, yet the Board in its discretion decided not to impose such interest. The Board could have held that Consolo was entitled to one-third of the available banana space during the reparations period, as had been recommended by the Examiner, since there were only three qualified shippers during that period. Yet the Board held that Consolo was entitled to only 18.46% of the space, a determination based on the space allocated to him after the reparations period. This holding had the effect of reducing the amount of reparations substantially. The net effect of these and other adjustments was to reduce the Examiner's recommended award of \$259,812.26, plus interest from the date of arrival of each vessel during the reparations period, to only \$106,001, without any interest.³⁸

³⁸ An additional point requires brief mention. The court thought that "Consolo's position is hardly deserving of greater sympathy than Flota's", because the only "pecuniary brunt" he suffered was a loss of "unrealized profits" (i.e., the profits he would have made had Flota carried his bananas), and because for several years prior to April 1957 Consolo had received preferential treatment from Grace Line (R. 698). But the loss

In short, the record shows that the Commission was amply justified in finding (a) that Flota took a knowing and calculated risk, when it refused to grant reefer space to Consolo, that its conduct would be held unlawful; (b) that it did so, not because it was honestly concerned with avoiding a breach of a lawful contract with Panama Ecuador, but because it preferred the advantages of the one-shipper arrangement; (c) that when Flota did seek a determination of the legal question from the Board, the Board acted as expeditiously as the circumstances—including Flota's own frequent requests for delay—permitted; (d) that in the computation of damages, the Board was most careful to eliminate all items of damage that might conceivably have been inequitable to impose on Flota; (e) and that, in sum, considering all of the circumstances, the equities weighed more strongly in favor of Consolo—the innocent and injured shipper—than Flota, whose good faith was doubtful and whose unlawful conduct was conceded. We submit that the court below should not have disturbed the Commission's determination.

of unrealized profits caused by the common carrier's unlawful refusal to carry the shipper's goods is the proper, and indeed the only adequate, measure of the shipper's damages. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U.S. 38; *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.A. 2), certiorari denied, 313 U.S. 582. The fact that Consolo had earlier received preferential treatment from Grace cannot absolve Flota from paying reparations for the injury it later inflicted upon Consolo. Surely, any preference received by Consolo from a different carrier during an earlier time period did not forever place him outside the protection of the Shipping Act.

CONCLUSION

While the court of appeals had jurisdiction to set aside the Commission's reparations order, it erred in so doing here. The decision below should therefore be reversed.

Respectfully submitted.

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OCTOBER, 1965

APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, provides:

Section 14 (46 U.S.C. 812):

* * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Section 16 (46 U.S.C. 815):

* * * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever:

* * * * *

Section 22 (46 U.S.C. 821):

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

* * * * *

Section 29 (46 U.S.C. 828):

In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 30 (46 U.S.C. 829):

In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the

carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Section 31 (46 U.S.C. 830):

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Inter-

state Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

The Administrative Orders Review Act (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.*, provides:

Section 2 (5 U.S.C. 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 * * *.

Section 3 (5 U.S.C. 1033):

The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Section 8 (5 U.S.C. 1038):

* * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. * * *

The Judicial Code, 28 U.S.C. 1 *et seq.*, provides:

Section 1336:

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin,

set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

Section 1398(a):

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 2321:

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

Section 2323:

* * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or require-

ment or any part thereof, and the interest of such party.

Section 2325:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*, provides:

Section 13(1):

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 16(1):

If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Section 16(2):

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

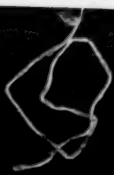
Section 16(3)(f):

A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State.

court within one year from the date of the order, and not after.

Section 16(12):

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Respondents

On Writ of Certiorari to the United States Court of Appeals for
the District of Columbia Circuit

BRIEF FOR RESPONDENT
FLOTA MERCANTE GRANCOLOMBIANA, S. A.

OPINIONS BELOW

The opinion of the Court of Appeals on the judgment under review is reported at 342 F. 2d 924 (C.A.-D.C. 1964) (R. 686-98). The previous opinion of that court, remanding the case to the Federal Maritime

Commission,¹ is reported at 302 F. 2d 887 (1962) (R. 651-59). The two opinions of the Federal Maritime Board prior to the first decision of the Court of Appeals, are reported at 5 F.M.B. 633 (1959) (R. 1-13), and at 6 F.M.B. 262 (1961) (R. 265-81). The opinion and order of the Federal Maritime Commission, which the Court of Appeals set aside in the action here under review, is reported at 7 F.M.C. 635 (1963) (R. 500-514).

JURISDICTION

The judgment of the Court of Appeals under review was entered on December 17, 1964 (R. 699). The petition for writ of certiorari was filed on March 16, 1965, and granted on June 1, 1965 (R. 700), 381 U.S. 933. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 5 U.S.C. § 1040.

QUESTIONS PRESENTED

1. Where the Court of Appeals had jurisdiction under the Hobbs Act, of (a) a carrier's petition to review a finding of violation of the Shipping Act, to the extent that it served as a basis for a reparations order against the carrier, and (b) the shipper's petition to review the reparations order, in an effort to increase the amount thereof, whether that court also had jurisdiction to determine the validity of the same reparations order upon challenge by the carrier?

2. Whether the Maritime Commission is required mechanically to award reparations for a period in which the law was unsettled and the carrier was actively

¹ The Federal Maritime Commission succeeded to the relevant functions and duties of the Federal Maritime Board, on August 12, 1961, by Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C. § 1111, note).

and in good faith seeking a declaratory order, where the record compels a finding, and the court has so found, that such an award would be inequitable?

3. In concluding that there was no basis for the Commission's principal findings, and that the Commission had abused its discretion, did the Court of Appeals apply an improper standard of review?

4. If the Court of Appeals erred in respect of questions 2 and 3, whether its judgment is nevertheless supportable on the grounds of (a) the *ex parte* participation in the Commission's decision on remand, of its attorneys who had previously acted in this case as adversaries against the carrier, and (b) the absence of legally cognizable damages.

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*; the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. § 1031 *et seq.*; the Hepburn Act of 1906, 34 Stat. 584 *et seq.*; the Mann-Elkins or Commerce Court Act of 1910, 36 Stat. 539 *et seq.*; the Judiciary Act of 1911, 37 Stat. 1087 *et seq.*; the Urgent Deficiencies Act of 1913, 38 Stat. 208 *et seq.*; the Judicial Code, 28 U.S.C. 1 *et seq.*; and the Administrative Procedure Act, 60 Stat. 237 *et seq.*, 5 U.S.C. § 1001 *et seq.* Pertinent portions of Sections 22, 29, 30, and 31 of the Shipping Act; Sections 2, 3, 7, 8, 9(a) of the Hobbs Act; Section 5 of the Hepburn Act; Sections 1 and 3 of the Mann-Elkins Act; Sections 24, 207, 209, 211 and 213 of the Judiciary Act of 1911; the Urgent Deficiencies Act; Section 1336(a) of the Judicial Code; and Section 10 of the Administrative Procedure Act, are set forth in the Appendix.

STATEMENT OF THE CASE

This case involves a claim by Petitioner Consolo, a banana shipper, against Respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as "Flota"), a steamship company, for reparations for alleged violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*).

1. *Flota's inability to obtain shippers.* Flota is a steamship company organized by the Governments of Colombia and Ecuador (R. 19). Flota's vessels have a limited amount of refrigerated ("reefer") space available to carry bananas from Ecuador (R. 77-80). For five years prior to July 1955 Flota was unable to obtain regular shippers to use the reefer hold in its vessels. It had had none since February 1954 (R. 77-82).

2. *The 1955 contract and option.* On July 20, 1955, Flota entered into a contract with Panama Ecuador, a new banana shipper, for the use of its reefer facilities for the carriage of bananas from Ecuador to Philadelphia (R. 177-88). The contract was entered into only after Flota advertised for interested shippers and received no response, and was the only way at that time that Flota could assure use of its reefer facilities (R. 19, 77-82, 134-39, 173). The contract was in accordance with prevailing and long standing industry practice. See *Philip R. Consolo v. Grace Line*, 4 F.M.B. 293, 297 (1953).²

The term of the contract was for two years, plus three years at Panama Ecuador's option, subject to its meet-

² In *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293, 297 (1953), the Board found that such contracts had been utilized at least since the 1930's.

ing the rate offered by any other shipper (R. 183-84). The contract provided that if any provision was declared invalid Flota might terminate the contract on seven days notice without liability (R. 181).

3. *Exercise of the option.* In early 1957 Panama Ecuador advised Flota it wished to exercise its option. In March 1957 it met the terms of the option, thereby perfecting its contractual right to the remaining period of the 1955 contract. Flota's Board of Directors so determined on March 13, 1957, and advised Panama Ecuador thereof in late March 1957 (R. 188, 195-99, 430-38).

On May 22, 1957, Flota and Panama Ecuador formally amended the 1955 contract, acknowledging the previous exercise of the option, amending several earlier provisions, and providing that "all of the remaining terms and conditions [of the 1955 contract] shall remain in full force and effect as if this agreement had not been entered into" (R. 187-91, 442).

At the time Panama Ecuador applied to exercise its option, Consolo also applied for an exclusive contract for the same space, commencing July 20, 1957 (R. 204b-206). Consolo was formally notified on June 21, 1957, that his bid had not been accepted (R. 207).

*The Federal Maritime Board, affirmed by the Court of Appeals, found that none of Flota's actions during this period gave rise to any liability or violated any duty to Consolo** (R. 277-78, 663), and this finding is not now in issue.

4. *Consolo's request of August 23, 1957.* On August 20, 1957, the Board served an order on Grace Line, an-

* Emphasis added throughout this Brief.

other carrier, in its Docket Nos. 771 and 775, to which Flota was not a party, directing that carrier to cancel its existing contracts with certain banana shippers, including Consolo, and thereafter to offer two year contracts to all qualified shippers upon an allocated space basis. The Board's order was premised on a novel theory, set forth in its April 30, 1957 Report, which theory was later held to be invalid, and upon a finding that Grace Line's existing contracts unlawfully preferred Consolo, *et al. Banana Distributors, Inc v. Grace Line Inc.*, 5 F.M.B. 278, 283, 286, I-II (1957), *vacated and remanded, Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709 (C.A. 2d 1959).³

On August 23, 1957, his contract on Grace Line's vessels having been thus ordered cancelled, Consolo wrote a letter to Flota, citing the Board's ruling as to Grace Line, and stating that "I wish to be considered for a fair and reasonable amount . . ." of Flota's reefer space, and threatening suit against Flota if it failed to comply (R. 208). Consolo's letter did not specify the amount of space desired by him, or the date, voyage, or period for which space was desired, or the rates or terms desired by or acceptable to him; offered no undertaking, guarantee or other commitment; and tendered no bananas to Flota. This was the letter from which the Commission later dated reparations (R. 512).

5. *Flota's dilemma.* During the same period, and from then until mid-1959, Flota received numerous demands for reefer space from shippers and lawyers, requesting many times more than Flota's total reefer

³ Further proceedings: *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 615 (1959), *affirmed*, 280 F.2d 790 (C.A. 2d 1960) (one judge dissenting), *cert. denied*, 364 U.S. 933 (1961).

capacity, and some like Consolo, threatening litigation for failure to comply (*e.g.*, R. 216-20, 386-90). Panama Ecuador, which had made a substantial investment in reliance on its contract with Flota, declared it would sue Flota for breach of contract if Flota complied with those demands (R. 38-39, 140, 152, 161). Flota faced litigation whichever way it turned, and the threat of a substantial suit for damages by Panama Ecuador.

6. *Flota's attempts to obtain a ruling from the Board.* On October 1, 1957, Flota's officials came to Washington to seek advice or a ruling from the staff of the Federal Maritime Board. The Board's staff, including the Chief of its Regulations Office, which was primarily concerned with such matters, stated they were unable to advise Flota whether or not its contract with Panama Ecuador was valid (R. 140-44, 158-59, 163-65, 167-68).

On October 30, 1957, Flota formally petitioned the Board for a declaratory order to terminate the uncertainty that had arisen in accordance with Section 5 (d), Administrative Procedure Act (5 U.S.C. §1004), and Rule 5(i) and 10 of the Board's Rules (R. 37-41). As the court below found:

"Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit" (302 F. 2d at p. 896, n. 15) (R. 665).

Flota believed it would obtain a ruling within "a month or two months after we presented the problem" (R. 164-65).

7. *The Board's delay and ultimate action.* In January 1958 the Board promised "early action" (R. 56). The Board did not hold a meeting or assign a docket number to Flota's petition until May 1, 1958 (R. 63-64, 517-18). It caused further delay, over Flota's objections, by consolidating Flota's petition with a complaint meanwhile filed by Consolo, seeking \$600,000 damages, from November 15, 1955 to November 15, 1957, and continuing damages thereafter (*ibid.*; R. 41-45); and then with a similar complaint filed in July 1958 by another claimant (R. 45-48).⁴ The Board's Examiner contributed to further delay by repeatedly refusing to sever and postpone the reparations issues (R. 468, 551-53, 556-57),⁵ and thereby necessitating the preparation of Flota's defense to more than \$1,200,000 in reparations claims, in addition to the issue posed by its petition for declaratory order. As a result of the Board's initial six month delay, and the consolidation and then refusal to sever the reparations issues, *inter alia*, that decision was delayed for nearly two years, until June 22, 1959, served July 2, 1959 (R. 1-15).

In the meantime the Board's April 30, 1957 Report and August 20, 1957 order as to Grace Line, which had precipitated the controversy as to Flota, were under appeal and on February 13, 1959, were reversed by the Court of Appeals for the Second Circuit (*Grace Line v. Federal Maritime Board*, 263 F. 2d 709). In May 1959 the Board issued a further order against the

⁴ Consolo's claim for the period prior to August 23, 1957 was later held to be without merit (R. 259, 278, 663); the second complaint was withdrawn in 1962 (F.M.B. Docket No. 841).

⁵ A decision he later reversed in the middle of the hearings, too late to expedite the proceeding (R. 121-22).

Grace Line on a different theory.⁶ By decision served July 2, 1959, in the instant case, the Board ordered Flota to cancel its contract with Panama Ecuador (R. 15-16), which it promptly did (R. 276-77).

8. *Case No. 15,330.* Flota petitioned for review of the Board's July 1959 action, under the Hobbs Act, to the extent it might serve as a basis for reparations (Case No. 15,330 below). No party has to this day challenged the jurisdiction of the Court of Appeals to entertain that action (*e.g.*, R. 34-35).

9. *The Board's reparations award.* In 1960 the Board held supplemental hearings to complete the evidence upon the reparations issue. By decision dated March 28, 1961 (R. 265-81), based upon the combined record of the earlier hearings and the supplemental hearings, it directed Flota to pay Consolo \$143,370.98 reparations for the period August 23, 1957 to July 12, 1959 (R. 280-81), largely the period Flota's petition for declaratory order had awaited decision by the Board. The Board's Report stated, *inter alia*, that during this period Flota should have accepted its 1957 decision as to Grace Line (R. 276), without indicating awareness that that decision had meanwhile been reversed by the Court of Appeals for the Second Circuit (263 F. 2d 709).⁷

10. *The Petitions for Review in Nos. 16,366 and 16,369.* The Board's reparations order of March 1961 was then the subject of cross-petitions for review by the Court of Appeals, by Consolo in No. 16,366, and by

⁶ That order was ultimately sustained, by a split decision, 280 F.2d 790 (C.A. 2d 1960), *cert. denied*, 364 U.S. 933 (1961).

⁷ The Board also indicated that Flota in 1957-59 should have relied on a 1953 report as to Grace Line (R. 276), as to which see R. 691.

Flota, in No. 16,369, both filed under the Hobbs Act (R. 491).

On July 7, 1961, Consolo filed his "Motion for Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond" (R. 620-37), in No. 16,369. After opposition by the United States and the Federal Maritime Board (R. 637-43) and by Flota and, after argument, the Court held the Motion in abeyance. In his briefs thereafter Consolo unequivocally urged the Court to take jurisdiction and dispose of the issues in both Nos. 16,366 and 16,369 (R. 647-50; see also R. 645-46).

11. *The Court of Appeals' first Decision.* By its decision of April 26, 1962 in Nos. 15,330,⁸ 16,366 and 16,369, the Court found that it had jurisdiction in all respects (R. 660-63), and affirmed the Board's actions in Nos. 15,330, and 16,366 (R. 653-59, 663-64). However, in No. 16,369, upon Flota's petition, the Court of Appeals found that notwithstanding that the Board could properly conclude in the first hearing that the contract with Panama Ecuador was in violation of the Shipping Act, the Board was free to reexamine the circumstances of the violation in the supplemental hearings "to reach a fair conclusion as to whether any reparations should be assessed" (R. 667); and that there was "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations (R. 665-67). The Court set aside the Board's reparations award and remanded the matter to the Commission (successor to the Board),

"to consider whether, under all circumstances, it is inequitable to force Flota to pay reparations, or

⁸ No. 15,330 had been held in abeyance (R. 652).

at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board" (302 F. 2d at p. 896) (R. 667).

In the proceeding before the Court of Appeals, the Commission's General Counsel, Mr. James L. Pimper, and Assistant General Counsel, Mr. Robert E. Mitchell, acted as advocates for the Commission, in opposition to Flota in No. 16,369, and in support of the Board's findings that Flota had violated the Shipping Act and should be compelled to pay reparations (R. 492, 651). Mr. Mitchell had also earlier acted as an advocate against Flota, as "Public Counsel" in the 1958-59 hearings, contending Flota had violated the Shipping Act (R. 480-84).

12. *The Commission's Report and Order on remand.* On remand the Federal Maritime Commission reopened the reparations questions, but denied Flota's request to take further evidence. Minutes of the Commission's meeting show that Mr. Pimper, General Counsel, was present at that meeting (R. 493-99, 524-25). After briefs and argument, the Commission on October 29, 1962, with Mr. Pimper, again present as General Counsel, and without notice to the parties, assigned to its General Counsel the function of preparing a "proposed report and order in accordance with instructions given at this meeting" (Minutes of October 29, 1962) (R. 526). No further Commission meetings were held upon this case for almost one year. On September 16, 1963, with Mr. Pimper (then Acting Managing Director) and Mr. Mitchell (then Acting General Counsel) present, the Commission approved their proposed report and order without change (Minutes of September 16, 1963) (R. 527).

The draft thus prepared and adopted as the Commission Report reiterated arguments earlier made to and rejected by the Court of Appeals, in which arguments Messrs. Pimper and Mitchell had joined as advocates. It did not mention the Court of Appeals' earlier finding of "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations, and attempted to absolve the Board from any responsibility for the delay in acting on Flota's petition for declaratory order. It termed the invalid 1957 *Banana Distributors* decision an "authoritative pronouncement" even though reversed by the Court of Appeals for the Second Circuit. For the first time in six decisions in as many years of litigation, the Commission's Report sought to justify the Commission's and the former Board's reparations awards on the grounds that it was "unconvinced" of Flota's "good faith" in executing what it erroneously termed the "renewal" contract of May 22, 1957. With reductions for one admitted and one other error in the former Board's calculations, it found there was no equity whatever in Flota's contention and reinstated the former Board's vacated award, directing Flota to pay Consolo \$106,001.00, with interest after 60 days (R. 500-14).

13. *The Petitions for Review in Nos. 18,230 and 18,235 and the Court's second decision.* After further cross-petitions to the Court of Appeals under the Hobbs Act, by Flota in No. 18,230 (R. 669-75) and by Consolo in No. 18,235 (R. 676), the Commission produced its official minutes disclosing that the Commission's report and order on remand were written, *ex parte*, by the same Commission attorneys who had opposed Flota as advocates before the Court of Appeals in the 1962 phase of the proceedings (R. 526-27).

By leave of Court (R. 685-86), Flota then supplemented its petition to so allege (R. 677-78). The cross-petitions in Nos. 18,230 and 18,235 were consolidated upon stipulation (R. 679, 684-85). In its opinion of December 17, 1964, the court below concluded that the Commission had ignored the guideposts of the court's earlier decision and the substantial weight of the evidence before it; that there was no basis for finding that Flota had not acted in good faith; and that the Commission had abused its discretion (R. 686-98). The court reversed the Commission's decision and remanded the matter to the Commission with directions to vacate the reparations order (R. 699).

In the proceedings in Nos. 18,230 and 18,235, neither Consolo, the Maritime Commission, nor the United States challenged any aspect of the Court of Appeals' jurisdiction under the Hobbs Act (R. 679-83). Likewise no party challenged the authority of the Maritime Commission to consider the circumstances of a violation of the Shipping Act to ascertain whether it would be unjust or inequitable to compel payment of reparations (R. 679-83).

The court below also found "... it unnecessary to rule upon [Flota's] objection to the active participation of the Commission's counsel who had earlier appeared before that court as an adversary, in the formulation and writing of the Commission's remand opinion" (R. 698), or Flota's contention related to the proper measure of damages (R. 671-75, 677, 679-80). It found in its 1962 opinion that the measure of damages employed was "relatively harsh" (R. 667). In its 1964 opinion it referred to Consolo's claimed damages as the loss of "speculative" and "unrealized" profits (R. 690, 698).

SUMMARY OF ARGUMENT

I

Jurisdiction below may be sustained on the general ground that carriers are entitled to initiate review of Shipping Act reparations orders under the Hobbs Act, and alternatively, on the narrow ground that since Consolo had invoked the court's jurisdiction of the same order in an effort to increase the amount thereof, the court was empowered to determine the entire controversy, on ancillary jurisdiction principles. In the lower court, both the Government and Consolo (the latter after an initial motion questioning jurisdiction) urged the court to take jurisdiction of the entire controversy. Only in this Court, after the lower court had ruled against their arguments on the merits, did either contest the lower court's jurisdiction.

Even now the Government contests only the broad ground, and concedes the narrower ground for the lower court's jurisdiction. As to the former, contrary to the Government's contention, because the instant case arises under the Hobbs Act and the Shipping Act, the issues and alleged policy considerations are substantially different from those in *ICC v. Atlantic Coast Line R. Co.*, No. 14, this Term.

A. The Hobbs Act in 1950 conferred jurisdiction upon the courts of appeals to review orders of the Maritime Commission "now subject to judicial review pursuant to the provisions of Section 31, Shipping Act, 1916." The Government and Consolo concede that reparations orders were "subject to judicial review" prior to 1950. Assuming, *arguendo*, their contention that review was exclusively by defense of ship-

per instituted enforcement suits, the question is whether such suits were subject to Section 31. Section 31 was a provision for venue and procedure, applicable by its terms *both* to suits to "enforce" and suits to "suspend or set aside". Even under the Government's and Consolo's contention therefore, review of a reparations order was "pursuant to . . . section 31"—and the Hobbs Act test is satisfied.

If Section 31 were held not to be applicable to enforcement suits brought under Section 30, the clear intention of Congress to make ICC venue and procedure provisions available also for similar suits under the Shipping Act, would be defeated; and the additional venue provisions of Section 31, intended for the shippers' benefit, would be unavailable. By the Government's logic, enforcement suits under Section 29 likewise would not be subject to the venue and procedure provisions of Section 31; since together Sections 29 and 30 cover all enforceable orders, the word "enforce" would be read out of Section 31. There is no evidence in the legislative history of the Shipping Act that Congress intended Section 31 not to apply to Section 30 enforcement suits, and there is affirmative evidence to the contrary.

The legislative history of the Hobbs Act shows that its overriding purpose was to provide a new, improved and uniform procedure for review of *all* judicially reviewable orders issued under the Shipping Act—as the Government contended below (R. 637-43). While the original bills were limited in coverage, the Maritime Commission proposed broader coverage "to secure uniform procedure with respect to *all reviewable orders*"; it explicitly named Section 22, Shipping Act, under which reparations orders are issued, and its

proposal was adopted. Congress had further reason to know that any bill to cover all reviewable orders would include reparations orders, because such orders were named in a list of reviewable ICC orders submitted by the Administrative Office of the United States Courts; and because during pendency of the legislation, this court decided in *United States v. ICC*, 337 U.S. 426 (1949), that orders concerning the payment of money were reviewable under the Urgent Deficiencies Act, forerunner of Section 31, Shipping Act.

In every relevant case involving review of Shipping Act reparations orders, the Hobbs Act has been held applicable—and in all such cases prior to this one, the Government has supported Hobbs Act review.

B. Even prior to the Hobbs Act, Shipping Act carriers had the right to institute review of reparations orders pursuant to Section 31, which provided for suits to “enforce, suspend, or set aside, in whole or in part, *any order* of the Board . . .”. No limitation excluding reparations orders appears in the statute or in its legislative history.

C. Because Section 31 of the 1916 Act was modeled in part upon ICC practice, it is pertinent to examine that practice prior to 1916. The key to the availability of direct review of ICC reparations awards prior to 1916 is the Hepburn Act of June 29, 1906. Section 5 thereof imposed an express duty to comply with all ICC orders, including reparations orders. A later part of the same section provided for venue and jurisdiction in the circuit courts for suits “to enjoin, set aside, annul, or suspend *any order or requirement* of the Commission . . .”. The language is unqualified and

there is no evidence that reparations orders were intended to be excluded therefrom. Five times in ten years, in the Hepburn Act, the Mann Elkins Act, the Judiciary Act, the Urgent Deficiencies Act and the Shipping Act, Congress dealt with suits to enjoin, suspend, annul or set aside "any order" of the ICC (or Shipping Board), and at no time manifested an intention to prohibit a carrier from initiating review of reparations orders. And in the only decisions interpreting this language it was held that ICC carriers had the right to initiate review of ICC reparations orders. *Southern Ry. Co. v. United States*, 193 Fed. 664 (Com. Ct. 1911); *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Com. Ct. 1911).

These decisions are entitled to compelling weight because of their proximity in time to the Acts in question, and because they were joined in by the Presiding Judge of the court, who had been Chairman of the Interstate Commerce Commission for 13 years immediately preceding his appointment to the Court, a member for 20 years and the principal ICC spokesman and a witness during the legislative consideration of both the Hepburn and Mann-Elkins Acts. In the absence of any clear indication to the contrary the conclusion is inescapable that Section 31 of the Shipping Act contemplated review of reparations orders as well as other reviewable orders under that Act.

The fact that venue and costs provisions in enforcement suits were somewhat broadened in 1906 will not support the Government's inference that enforcement suits were intended as the exclusive vehicle for review. Its argument that direct review was intended to apply only to obligatory and self-executing orders backed by provisions for per diem penalties is untenable, be-

cause, as enacted and for 23 years, the Shipping Act contained no "self-executing" or penalties provisions. The Government's arguments are but variations of those rejected in *Rochester Telephone Co. v. United States*, 307 U.S. 125, 136 (1939), *Baldwin v. Scott County Milling Co.*, 307 U.S. 378, 482-83 (1939); *United States v. ICC*, 337 U.S. 426 (1949); and *Pennsylvania RR Co. v. United States*, 363 U.S. 202 (1960), under which orders with respect to the payment of money, having the effect of both denial and grant, are reviewable under the "any order" language of the Urgent Deficiencies Act.

D. The policy considerations as to review of ICC orders are materially different from those affecting Maritime Commission orders reflected in the ICC's exclusion from the Hobbs Act, the differing problems relating to international shipping and the negligible number of Shipping Act reparations orders. The Hobbs Act overriding policy was to provide a new, improved and uniform system of review for all reviewable orders of the Commission. There is no evidence the Act was to cover only orders meeting all subsidiary objectives mentioned by the Government. The possibility that an occasional enforcement suit may be necessary after Hobbs Act review is as true of other orders as of reparations orders, and is merely a reflection of Congress' further policy to withhold enforcement powers from the Courts of Appeals.

Alleged Government inconvenience is inconsequential. Considerations of procedural convenience, economy in judicial time and shipper advantages support Hobbs Act review. The Hobbs Act merely transfers the administrative review phase of pre-Hobbs Act

enforcement suits, to the courts of appeals, whose decisions have *res judicata* effect, and leaves any remaining enforcement responsibilities to the district courts.

II

The Government concedes that the lower court had jurisdiction to entertain Flota's challenge to the Commission's reparations order in view of the fact that Consolo had already invoked Hobbs Act jurisdiction to review the same reparations order. The court's decision to take jurisdiction to settle the entire controversy is amply supported by principles of ancillary jurisdiction and considerations of procedural economy and fairness. It is further supported by section 9(a) of the Hobbs Act, which provides that when the court's jurisdiction is invoked and the agency record filed with it, it shall have exclusive jurisdiction to enter a judgment "determining the validity of . . . the order of the agency."

III

A. The lower court held that the mere fact the Board had found in 1959 that Flota's contract with Panama Ecuador was in violation of the Shipping Act did not preclude it from examining the circumstances of Flota's actions in the period prior to the Board's decision to assess the fairness of Consolo's reparations claim. Consolo did not challenge the validity of the holding in the proceedings below, and should not be permitted to raise the point here. The Government does not challenge the court's holding and recognizes that it does not differ in substance from the "firmly established mode of procedure" under the Interstate Commerce Act. The lower court's references to fair-

ness and equity are but a reflection of the statutory standard of violation—"unfair," "unjust," and "unreasonable" conduct. The Commission also has a discretionary reparations power under section 22 of the Shipping Act, which provides only that it shall issue such order "as it deems proper" and "may" award reparations.

B. The court below, which had the case before it twice, found no basis to support the Commission's key findings challenging Flota's good faith, and held that the Commission on remand had "ignored . . . the substantial weight of the evidence before it" (R. 689), and had "abused" its discretion (R. 698). There is in the court's action no departure from the normal standards of review.

Consolo states that he is "not expecting this Court to review the evidence." Though earlier recognizing that "the instant case . . . does not present the 'rare instance' calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings", and also contending that the dispute is basically a private one between Consolo and Flota, the Government's brief does in effect ask the Court to review the evidence. The lower court's restraint in remanding to the Commission in 1962, and its careful opinions in twice considering the Government's arguments, establish that it made a "fair assessment" of the record. By its settled policy this Court should inquire no further.

C. The decision below is also supportable on the ground that the Commission attorneys who had previously acted as adversaries against Flota in this litigation, improperly participated and advised in the

Commission's decision on remand. The court below found it unnecessary to rule upon the issue (R. 698). It is supportable on the additional ground that the Commission failed to apply the proper measure of damages and that Consolo failed to prove compensable damages. In its April 1962 opinion, the court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh" (R. 667); in its December 17, 1964 decision, it referred to plaintiff's claimed damages as the loss of "speculative" and "unrealized" profits (R. 690, 698).

ARGUMENT

I. THE COURTS OF APPEALS HAVE JURISDICTION UNDER THE HOBBS ACT TO DETERMINE THE VALIDITY OF MARITIME COMMISSION REPARATIONS ORDERS

The jurisdiction of the Court of Appeals under the Hobbs Act may be sustained on either of two grounds: first, that as a general matter carriers respondent to Shipping Act reparations orders may initiate judicial review to determine the validity thereof by petition under the Hobbs Act; second, that even if such review is not available generally, the exercise of jurisdiction by the court below was nevertheless proper in the particular circumstances of this litigation.

In the Court of Appeals, the United States and the Federal Maritime Commission joined Flota in urging that court to exercise jurisdiction on both the above grounds (R. 637-43). Consolo's initial position was that the court should either dismiss Flota's petition on No. 16,369 (but not Consolo's), or require Flota to post a bond (R. 620-37). However, Consolo thereafter urged that, "since review was sought here, the issues should be openly, fairly, and finally litigated here—as

Congress intended" (R. 645-46), and that "all the facts are before the Court and the controversy is ripe for final disposition" (R. 647-50). Thus ultimately Consolo himself urged the court to take jurisdiction in all respects.

The Court of Appeals found that it had jurisdiction on both grounds (R. 660-63), and remanded the case to the Maritime Commission (R. 667). In the subsequent proceedings before the Court of Appeals, Nos. 18,230 and 18,235, upon petitions by both Flota and Consolo, *no party challenged any aspect of the court's jurisdiction* (R. 679-83).

Only in Consolo's petition to this Court, *after* he lost on the merits before the Court of Appeals in Nos. 18,230 and 18,235, did he assert that the Court of Appeals lacked jurisdiction to entertain Flota's petition in No. 18,230. And only thereafter, and after the grant of the writ on the ICC's petition in the pending *Atlantic Coast Line* case, involving review of ICC reparations awards, did the Government reverse its position as to whether Shipping Act carriers generally might initiate Hobbs Act review of a Maritime Commission reparations order.⁹ The Government still concedes the narrower ground of the court's jurisdiction.

⁹ The Government here in effect incorporates its brief in the *Atlantic Coast Line* case.

A. Assuming That the Sole Mode of Review Prior to the Hobbs Act was Defense of an Enforcement Suit, the Hobbs Act Nevertheless Conferred Jurisdiction Upon the Courts of Appeals

1. Review of Enforcement Actions Was "Pursuant to . . . section 31"

Section 2 of the Hobbs Act,¹⁰ which became law December 29, 1950, conferred upon the courts of appeals

"exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of . . . such final orders of the . . . Maritime Commission . . . as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended."

The ultimate question under this statute is whether on December 29, 1950, reparations orders were subject to judicial review "pursuant to the provisions of section 31, Shipping Act, 1916". The Government and Consolo concede that such orders were "subject to judicial review";¹¹ they dispute merely the form of review proceeding and the forum in which it might have been brought.

The controlling issue here, therefore, is not whether judicial review of reparations orders was available prior to 1950, nor indeed the form and venue of that

¹⁰ 5 U.S.C. § 1032.

¹¹ The Government's brief, p. 29, states for example, "We think it plain that the carrier is entitled to complete judicial review of the reparations order in the enforcement action". And see Consolo's brief, p. 13, "The statutes provide only one review of a reparation order: by a district court after suit by an injured shipper". See also Administrative Procedure Act, Section 10(b) (Appendix, *infra*, p. 82); and *United States v. ICC*, 198 F.2d 958, 963-64 (C.A. D.C. 1952); *cert. denied*, 344 U.S. 893.

review, but whether at that time review of such orders was "pursuant to the provisions of section 31, Shipping Act, 1916", as that phrase was intended in the Hobbs Act. The answer to this question must be in the affirmative.

Section 31, Shipping Act, 1916, stated:

"That the venue and procedure, in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Section 31 did not, strictly speaking, create a right of review; it was rather a provision for venue and procedure, applicable by its terms both to suits to "enforce" and suits to "suspend or set aside". Since Section 31 prescribed venue and procedure for both types of suits, prior to 1950, it is not necessary in this case to decide whether the sole mode of review of reparations orders was, as Consolo and the Government now contend, by defense of enforcement suits, or whether a carrier might also have initiated review. Under either alternative, review of a reparations order was "pursuant to . . . section 31, Shipping Act, 1916"—and the Hobbs Act test is satisfied.

This conclusion is confirmed upon consideration of the statutory scheme of the Shipping Act.¹² Section 22 authorized the Board, after hearing, to "make such order as it deems proper", including orders for the

¹² Pertinent provisions of the Shipping Act are set forth in the Appendix, *infra*, pp. 68-70.

payment of money. Sections 29-31 collectively provided for their enforcement and review. Section 29 dealt with *enforcement* of "any order of the board other than an order for the payment of money"; Section 30, with *enforcement* of an "order of the board for the payment of money"; and Section 31 prescribed venue and procedure for both actions to enforce and actions to suspend and set aside.

The net effect was that Sections 29 *and* 31 applied to enforcement of orders other than for the payment of money, and Sections 30 *and* 31 applied to enforcement of orders for the payment of money. Additionally, Section 31 provided venue and procedure for all suits to suspend and set aside.

Under this scheme Section 31 had a threefold function, with respect to reparations enforcement suits under Section 30. First, Section 31 applied to such suits the full range of venue and procedure provisions applicable to Interstate Commerce Act orders, as of 1916.¹³ Second, to avoid any possible conflict between Section 30 and Interstate Commerce Act venue and procedure, it established the former as controlling in the event of conflict (by the "except as herein otherwise provided" clause); and third, it further broadened the venue of Section 30 enforcement proceedings by adding "but such suits may also be maintained in any district court having jurisdiction of the parties"¹⁴

¹³ See provisions of the Urgent Deficiencies Act and the Judiciary Act of 1911, Appendix, *infra*, pp. 78-81.

¹⁴ Section 30 provided that suit might be brought in "any court of general jurisdiction of a State, Territory, District or possession of the United States". Section 31 added that such suits "may also be maintained in any district court having jurisdiction of the parties".

If Section 31 were held *not* to be applicable to enforcement suits under Section 30, then the venue and procedure provisions applicable to Interstate Commerce Act reparations enforcement suits would *not* be available for similar suits under Section 30, Shipping Act, and the broadened venue provisions of Section 31, permitting suits also to be "maintained in any district court having jurisdiction of the parties", would likewise be unavailable in suits under Section 30.

Moreover, if, as Flota's opponents contend, the provision in Section 30 for enforcement of orders for the payment of money were held to be the exclusive provision in the Shipping Act pertaining to the enforcement of such orders, and therefore to have the effect of rendering Section 31 inapplicable to proceedings for enforcement of reparations orders, by the same logic the provision in Section 29 for enforcement of all other orders would have a similar effect, and would render Section 31 inapplicable to the enforcement of such other orders. But, between them, Sections 29 and 30 embrace the universe of "enforceable" orders under the Shipping Act. Accordingly, by such an argument the word "enforce" would be read out of Section 31.

If the word "enforce" were read out of Section 31, the words "except as herein otherwise provided" likewise would become meaningless, because the only other venue and procedure provisions contained in the Shipping Act are those in the enforcement provisions of Sections 29 and 30. And the words "any order" in Section 31 would have to be read as "any order other than for the payment of money".

It is thus evident that the Government's and Consolo's contention would virtually destroy the language and structure of Section 31.

Neither the Government nor Consolo has pointed to any evidence in the legislative history of the Shipping Act that Congress intended the venue and procedure incorporated by Section 31 not to be applicable to Section 30 suits. The concluding provision of Section 31, that "suits brought to enforce, suspend, or set aside", etc., "may *also* be maintained in any district court having jurisdiction of the parties", is affirmative evidence to the contrary.

The very premise of the argument of the Government and Consolo, that Shipping Act reparations orders were intended to be reviewed only "as in similar suits in regard to orders of the Interstate Commerce Commission", assumes the applicability of Section 31 to review of reparations orders prior to 1950—for it is in Section 31 that the language just quoted appears.

It can only be concluded that even suits to enforce reparations orders under Section 30 were "pursuant to the provisions of Section 31" prior to the Hobbs Act. Even as to such suits, therefore, the Hobbs Act test is satisfied.

2. It Was the Purpose of the Hobbs Act to Provide a Uniform System for Review of All Reviewable Orders Under the Shipping Act

The overriding purpose of the Hobbs Act, clearly manifested in its legislative history, was to provide a new, improved and uniform procedure for review of *all* judicially reviewable orders issued under the Shipping Act. And as Consolo and the Government contended to the Court of Appeals there is evidence also "that Maritime Board reparations orders were specifically included within the coverage" of the Hobbs Act (R. 633, 641). Now that it has reversed its position, the Government does not assert that it earlier

misread the legislative history of the Hobbs Act; instead it just ignores it.¹⁵

Under the original legislative proposals, H.R. 1468 in the 80th Congress and H.R. 2916 in the 81st Congress, applicable to both the ICC and the Maritime Commission, orders entered under Section 22 of the Shipping Act, including reparations orders, and similar orders under the Interstate Commerce Act, would not have been covered.¹⁶ Moreover, with respect to orders not covered, H.R. 2916 stated:

“With respect to all other orders of the Interstate Commerce Commission and all other orders of the United States Maritime Commission, remedies now provided by law shall remain unaffected by this Act; and where an order is entered under one of the statutory provisions enumerated above and also under another [sic]¹⁷ statutory provision not enumerated above, such order shall not be reviewable under this Act, and the applicable remedies shall be those that would apply for this Act” (See Sec. 2, H.R. 2916, 81st Cong. 1st Sess. (1949)).¹⁸

¹⁵ A true copy of the Government's argument to the Court of Appeals (“Reply Of Respondents To Intervenor's Motion To Dismiss Or Require A Bond”), has been filed with the Clerk of this Court. It appears also at R. 637-43.

¹⁶ These bills are reprinted in Hearings before Subcommittees of the House Judiciary Committee, pp. 21-24, 106-109; Hearings on H.R. 1468, H.R. 1470 and H.R. 2271, 80th Cong. 1st Sess. (1947), and Hearings on H.R. 2915 and H.R. 2916, 81st Cong. 1st Sess. (1949), a single volume. Committee reports include House Report Nos. 1619, 1620 and 1621, 80th Cong. 2d Sess. (1948), and Senate Report No. 2618, 81st Cong. 2d Sess. (1950).

¹⁷ Hearings, p. 107; see also p. 22.

¹⁸ H.R. 1468 (80th Cong.) contained a similar clause, concluding “and the remedies now provided by law under the Urgent Deficiencies Act shall apply thereto” (Hearings, p. 22).

Thereafter, the Maritime Commission's Chairman and Solicitor urged the House Judiciary Committee to *broaden* the coverage of the proposed legislation so far as that Commission was concerned, to extend to "all reviewable orders" of the Commission. The Commission's Chairman advocated "substitution of the new procedure for the old with respect to all reviewable orders" of the Commission, "in order to secure uniform procedure with respect to *all reviewable orders*" (Hearings, pp. 144, 145, 147). The Commission's Solicitor testified:

"We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders.

"The act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, Section 22 of the Shipping Act, 1916, and we feel that this is shown in our written report, and I will not elaborate upon it, that the provisions of this act should apply to all reviewable orders of the Maritime Commission" (Hearings, p. 137).

He also proposed amendatory language to H.R. 2916 (Hearings as above, p. 147), which he testified would eliminate fears "that the bill might have precluded review of some cases . . ." (Hearings, p. 149). The bill was amended and enacted as the Commission proposed. The language thus proposed and adopted brought within the Hobbs Act all orders of the Commission "subject to judicial review, pursuant to the provisions of Section 31 of the Shipping Act". It is completely clear that this amendment was intended to describe all reviewable orders, without exception, and specifically

including orders under Section 22, under which reparations orders are issued.

Congress had further reason to know that reparations orders were included within the ambit of reviewable orders covered by the Hobbs Act. The comparability of many orders issued by the Maritime Commission and the ICC was the premise for originally including both these agencies in the same bill. Prior to the exclusion of the ICC from the bill,¹⁹ and the broadening of the coverage of the proposed legislation to include all reviewable orders of the Maritime Commission, the Administrative Office of the United States Courts submitted, and the House Judiciary Committee reprinted in its Report No. 1621, pp. 3-7, a list of 40 different kinds of actions of the ICC "now included in the jurisdiction of the district courts, under the interstate commerce laws", including "13. Actions by complainants or persons with beneficial interest to enforce compliance with ICC orders for the payment of money. . . ."²⁰

This list immediately followed a statement that "if H.R. 1468 is enacted, the jurisdictional proceedings covered by that bill will be transferred to the circuit courts of appeals" (House Report No. 1621, 80th Cong.

¹⁹ The Assistant Chief Counsel of the Interstate Commerce Commission testified that problems of review under the Interstate Commerce Act were unique. He stated that "The orders of the Interstate Commerce Commission, I think it will be conceded, are unlike those of any other administrative agency" and that the ICC should be excluded from coverage of the proposed legislation. This request was granted. Hearings, p. 160; see generally pp. 32-49, 152-172.

²⁰ Also "16. Actions to enforce, suspend, or set aside decisions, orders, or requirements . . ." of the Commission.

2d Sess., p. 4). The fact that H.R. 1468 was thereafter amended to cover all reviewable orders of the Maritime Commission is additional persuasive evidence that Congress intended the Hobbs Act to include reparations orders and any other Maritime Commission orders comparable to those in the list submitted by the Administrative Office of the United States Courts.

During the pendency of this legislation in Congress, some 18 months before the Hobbs Act was finally passed, this Court decided *United States v. ICC*, 337 U.S. 426 (June 20, 1949). It there held that an ICC order concerning the payment of money damages (there denial of reparations) was reviewable under the Urgent Deficiencies Act (38 Stat. 208)—albeit by a one-judge rather than a three-judge court. It cannot be presumed that Congress, the Judiciary Committees and the interested Government agencies and witnesses were not fully aware of the decision,²¹ or that they had no opportunity thereafter to object to the inclusion in the Hobbs Act of orders relating to the payment of money, if that had been their disposition.²²

To the contrary the Senate Judiciary Committee, Report No. 2618, December 11, 1950 (pp. 3, 5) commented that "in many cases" three-judge courts were required—which implicitly recognized that the three-judge court requirement did *not* apply to all reviewable orders.²³ Yet the clear intention throughout con-

²¹ The pendency of that litigation was referred to in House Report No. 1621 (1948), p. 25.

²² Cf. *United States v. National City Lines*, 337 U.S. 78, 82-83 (1949).

²³ The district court in *D.P. Piazza Co. v. West Coast Line*, 113 F. Supp. 193, 196 (S.D.N.Y. 1953), aff'd, 210 F. 2d 947 (C.A. 2d 1954), cert. denied, 348 U.S. 839, drew the same inference.

sideration of the Hobbs Act was to provide a new procedure for all reviewable orders.

The legislative history of the Hobbs Act thus provides powerful additional support for the Court of Appeals' conclusion that it had jurisdiction under that Act to review Shipping Act reparations orders.

3. The Judicial Precedents Under the Hobbs Act Unanimously Support Review

In every case decided since the Hobbs Act involving review of Federal Maritime Board or Commission orders in reparations proceedings, the Hobbs Act has been held applicable—and in all such cases the United States, Federal Maritime Board and/or Commission have supported Hobbs Act review. *D. L. Piazza v. West Coast Line*, 113 F. Supp. 193 (S.D.N.Y. 1953), and *D. L. Piazza Co. v. West Coast Line*, 119 F. Supp. 937 (N.D. Ill. 1953), were actions brought in the district courts subsequent to the Hobbs Act to review denial of reparations. The district court in each case dismissed, upon motion of the Maritime Board and the United States asserting Hobbs Act jurisdiction. The Court of Appeals affirmed in the first case, and this Court denied review. *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2d 1954), *cert. denied*, 348 U.S. 839.

Hobbs Act jurisdiction was exercised without challenge by any party in *Kempner v. FMC*, 313 F. 2d 586 (C.A.D.C. 1963), *cert. denied*, 375 U.S. 813 (denial of reparations by the Commission); *Swift & Company v. FMC*, 306 F. 2d 277 (C.A.D.C. 1962); and *States Marine Lines v. FMC*, 313 F. 2d 906 (C.A.D.C. 1963), *cert. denied*, 374 U.S. 831, the latter two involving petitions for review of reparations, precisely as in the instant case.

**B. Carriers Had the Right to Initiate Review of Shipping Act
Reparations Orders Even Prior to the Hobbs Act**

The assumption heretofore made, that prior to the Hobbs Act, review was available only by defense of an enforcement suit under Section 30, Shipping Act, is in any event invalid. Even prior to the Hobbs Act a Shipping Act carrier had the right to institute review of reparations orders pursuant to Section 31 of the Shipping Act. The language of Section 31 is unqualified. It contemplated suits to "enforce, suspend, or set aside, in whole or in part, any order of the board . . .". No limitation excluding reparations orders appears in Section 31 itself, elsewhere in the Shipping Act, or in its legislative history.

The Government and Consolo contend that Section 30 provides the exclusive means for review of orders for the payment of money, through defense of an enforcement suit. But if this contention were upheld, by the same logic Section 29 would provide the exclusive means for review of all other orders, also through defense of an enforcement suit, and Section 31 would be read out of the statute.

**C. Experience Under The Interstate Commerce Act Prior to
1916 Confirms the Right To Direct Review**

There is evidence also that, with modifications "because of the difference between rail and water traffic" (53 Cong. Rec. 8106), the sponsors of the Shipping Act legislation intended in 1916 to adapt "the nearly 30 years of experience of the Interstate Commerce Commission . . ." in the enforcement of the Interstate Commerce Act (59 Cong. Rec. 8081). In view of this statement and of the well-known rule that "statutes are construed by the courts with reference to the circumstances

existing at the time of the passage,"²⁴ the law under the Interstate Commerce Act prior to 1916 assumes particular importance.

The key to the availability of direct review of ICC reparations awards prior to 1916 is the Hepburn Act of June 29, 1906 (34 Stat. 584). Prior to 1906, the Interstate Commerce Act imposed no direct obligation upon carriers to obey ICC orders, without judicial enforcement proceedings, and no carrier (or shipper)²⁵ ever sought review by a suit to enjoin, suspend or set aside an ICC order.²⁶

Section 5 of the Hepburn Act (Appendix, *infra*, p. 73), amending Section 16 of the Interstate Commerce Act, for the first time imposed an express duty to comply with ICC orders. It provided:

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect" (34 Stat. 584, 591).

²⁴ United States v. Wise, 370 U.S. 405, 411 (1962); United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 480-81 (1932).

²⁵ See United States v. Los Angeles & S.R. Co., 273 U.S. 299, 309 (1927); and 22 ICC Ann. Rep. 20 (1908).

²⁶ The Government's brief (p. 12) in the pending Atlantic Coast Line case incorrectly describes the 1905 Circuit Court of Appeals decision in Western N.Y. & P.R. Co. v. Penn Refining Co., 137 Fed. 343, 354 (C.C.A. 3d 1905), *aff'd*, 208 U.S. 208 (1908), as expressly holding that no reparations award was reviewable. That case involved a shipper's suit to enforce an ICC reparations award, and the "express" holding referred to by the Government, was dictum. It was coupled with and reciprocally related to the further dictum that a shipper likewise could not obtain review of an ICC action *denying* reparations—which of course does not reflect the law today. United States v. ICC, 337 U.S. 426 (1949).

Reparations orders were among those contemplated, because earlier portions of Section 5 dealt with orders for the payment of money, among other things, and later portions with orders other than for the payment of money.

Consistently with the obligation thus imposed, the penultimate subsection of Section 5 further stated:

“The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend *any order or requirement of the Commission* shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated . . . and jurisdiction to hear and determine such suits is hereby vested in such courts . . .” (34 Stat. 584, 592) (Appendix, *infra*, p. 75).

By this provision, the Hepburn Act conferred jurisdiction upon the circuit courts to enjoin, set aside, annul and suspend “any order or requirement” of the Interstate Commerce Commission. The language is unqualified, and reparations orders must have been among those contemplated, for Section 5 was concerned with them.

The Hepburn Act was followed by the Mann-Elkins Act of 1910 establishing the Commerce Court, the Judiciary Act of 1911, the Urgent Deficiencies Act of 1913, and the Shipping Act, 1916. Five times within ten years Congress dealt with jurisdiction, venue and procedure, with respect to suits to enjoin, suspend, annul, or set aside “any order” under the Interstate Commerce Act and the Shipping Act. Each afforded an occasion for Congress to manifest an intention to pro-

hibit a carrier from initiating review of a reparations order, if that had been Congress' intention. Instead the provisions respecting reviewability in these laws uniformly manifest an unqualified intention to permit and provide for review of "any order", without excluding orders for the payment of money (Appendix, *infra*, pp. 70, 75-78).

Moreover, in the only decisions interpreting the Hepburn and successor acts prior to 1916, it had been held that ICC carriers had the right to initiate review of ICC reparations orders under the "any order" language above quoted. The first action by a carrier to review an ICC reparations order came before the Commerce Court in 1911, upon a motion to dismiss for lack of jurisdiction²⁷ *Southern Ry. Co. v. United States*, 193 Fed. 664 (Com. Ct. 1911). The Commerce Court rejected the same arguments as the Government now makes, and upon consideration of both the Hepburn and Mann-Elkins Acts, *expressly held that its jurisdiction extended to carrier-instituted suits to annul ICC reparations orders*.²⁸

²⁷ The first action to enjoin any order of the Interstate Commerce Commission reached the Supreme Court in 1909 in *Stickney v. I.C.C.*, 215 U.S. 98 (1909) (involving a rate order).

²⁸ The Commerce Court extended this ruling in *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Com. Ct. 1911), to review an action by a shipper to set aside an ICC order denying a carrier's application for authority to make a refund to the shipper. In two subsequent cases the Commerce Court asserted jurisdiction to review actions to set aside ICC orders denying reparations: *Russe & Burgess v. ICC*, 193 Fed. 678 (Com. Ct. 1912) and *Thompson Lumber Co. v. ICC*, 193 Fed. 682 (Com. Ct. 1912), thereafter dismissed for want of jurisdiction upon authority of the intervening Supreme Court decision in *Procter & Gamble v. United States*, 225 U.S. 282 (1912), which was in turn overruled in *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939).

The Government now denies the force of the *Southern Ry. Co.* decision on the grounds that it "did not consider the Act's legislative history" (its brief in *Atlantic Coast Line*, p. 15). But the opinion in *Southern Ry. Co.* was joined in by Presiding Judge Knapp, who prior to his appointment to the Commerce Court in 1910 had been Chairman of the Interstate Commerce Commission since 1898, and a member since 1891. As Chairman he was the principal ICC spokesman and a witness during the legislative consideration of both the Hepburn Act of 1906 and the Mann-Elkins Act of 1910, by which the Commerce Court was created.²⁰ Among all persons with knowledge of the problems, practice and procedure under the Interstate Commerce Act, and the legislative history and intent of the Hepburn and Mann-Elkins Acts, he must be regarded as foremost. The *Southern Ry.* decision cannot be impeached for lack of knowledge of legislative history; indeed, for Judge Knapp's unique experience, it is entitled to compelling weight.

Less than two years later Congress passed the Urgent Deficiencies Act of 1913 (38 Stat. 208), transferring to district courts the jurisdiction previously vested in the Commerce Court. That Act repeated the "any order" language interpreted in the *Southern Ry.* case, in its provision for "venue of any suit hereafter brought to enforce, suspend, set aside, in whole or in part, any order of the Interstate Commerce Commission" (38

²⁰ Upon the dissolution of the Commerce Court, Judge Knapp was assigned to the Circuit Court of Appeals for the Fourth Circuit. (C.A. Miller, *The Lives of the Interstate Commerce Commissioners and the Commission Secretaries*, pp. 31, 32 (1946)). See also Note on the Constitution of the Court, 188 Fed. 229).

Stat. 220). The reenactment of the language in question, without change, cannot be disregarded.³⁰

We come thus to 1916, when the Shipping Act was passed. The conclusion is inescapable that in referring to "suits brought to enforce, suspend, or set aside, in whole or in part, any order", Section 31 of the Shipping Act likewise contemplated actions to suspend or set aside reparations orders.

The Government suggests that because provision was made elsewhere in the Hepburn Act to facilitate enforcement of ICC reparations orders, by somewhat broadening venue and by exemption of shippers from costs in enforcement suits, Congress could not have intended at the same time to permit a carrier to initiate review to set aside an invalid reparations order. Enlargement of rights as to venue and costs in an enforcement suit is not proof of an intention of Congress in 1906 to make reparations enforcement suits the exclusive vehicle for review. It is a more logical inference that Congress intended the direct review provision of the Hepburn Act to be a general review provision, applicable to all orders, with the provision for enforcement suits at law for reparations orders preserved because of the carrier's Constitutional right to demand a jury trial.³¹ The broadened venue and cost provisions in such enforcement suits are completely consistent with this hypothesis.

If the result for which the Government argues has been intended, surely some clear reflection of that in-

³⁰ The Government's brief in *Atlantic Coast Line*, pp. 15, 41, states also that the plaintiff in *Southern Ry.* later dismissed its action and that it could not be appealed. The dismissal was by stipulation "without prejudice", and the earlier opinion sustaining jurisdiction was neither withdrawn nor subsequently overruled.

³¹ *Meeker & Co. v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915).

tention would have appeared in hearings, reports, or debates. Surely Congress could have found the words to express that intention in the statute. In the same Section 5 of the Hepburn Act in which the review provisions appear, Congress referred variously to "orders for the payment of money", "every order of the Commission", "any order made under the provisions of section 15 of this Act", and "any order of the Commission".³² Precision in the choice of language is manifest. Yet in the jurisdiction and venue provisions it referred without limitation to "any order of the Commission". In the face of the unqualified language of the venue and jurisdiction provisions, the adjustments in the enforcement mechanism in 1906 will not support the Government's inference.

The Government in *Atlantic Coast Line* has also contended that by the Hepburn Act, orders other than for the payment of money were for the first time made obligatory and "self-executing" by the provision for per diem penalties for violations, and that jurisdiction to entertain actions to enjoin, suspend, or set aside was conferred only as a measure of relief against the obligation.³³ It concludes that orders as to which

³² (34 Stat. 584, 590, 591).

³³ In this connection the Government's brief in *Atlantic Coast Line*, pp. 19-20, quotes portions of statements by Senator Foraker at 40 Cong. Rec. 5133, and Senator Long at 40 Cong. Rec. 4368. Senator Foraker unsuccessfully advocated an amendment under which the Government would prosecute suits for rate reductions without prior proceedings before the ICC and the courts. The remark quoted by the Government is a portion of a heated exchange by Senator Foraker with a proponent of the legislation, during which the latter suggested that Senator Foraker did not understand the existing law. In view of Senator Foraker's contradictory statements as to the meaning of the bill, the suggestion seems proper. At 40 Cong. Rec. 5132 he commented: "The bill

Congress provided no monetary penalties, such as ICC reparations orders, should be left to review exclusively in enforcement proceedings.

But if the measure of reviewable orders was as the Government says, then no order under the Shipping Act, 1916, would have been reviewable — because Congress did not impose penalties for the violation of orders under the Shipping Act until 1939.³⁴ By the Government's logic Section 31 would have been a virtual nullity for 23 years.

The Government's argument that only "self-executing" orders were intended to be directly reviewable is but a restatement of the argument made and rejected in earlier years, that only orders enforced by the Commission were directly reviewable. Both arguments describe orders "other than for the payment of money". Such an argument was rejected in this Court in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 136 (1939),³⁵ not cited in the Government's brief.

does not provide for a suit being brought by the carrier"—which obviously was incorrect. If his comments in context are a reliable reflection of the intention of Congress as to the bill subsequently enacted, which we deny, still he said nothing to indicate that enforcement suits were intended to be the exclusive means for reviewing reparations orders. The same may be said for Senator Long's comments.

³⁴ P.L. 259, 76th Cong. (1939), 53 Stat. 1187, amending Section 806, Merchant Marine Act, 1936 (46 U.S.C. § 1228).

³⁵ The Court stated:

"To be sure the opinion in the Procter & G. Co. Case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review" 307 U.S. at 136.

Further, the source of the carrier's obligation to obey ICC orders was not in the monetary penalties clause of the Hepburn Act, but in the sixth subsection of Section 5 of the Hepburn Act (34 Stat. 591), which was *not* limited to orders other than for the payment of money. As noted above that subsection imposed an affirmative duty upon every common carrier to observe and comply with *all* ICC orders "so long as the same shall remain in effect".

It thus cannot be maintained that a reparations order imposed no obligation, or had no legal consequences. Even if no monetary penalties attached for refusal to pay, reparations orders normally carried an interest obligation.³⁶ The Court held in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 482-83 (1939), that payment pursuant to a reparations order was not "voluntary" (and the carrier's recovery thereof was not barred when the ICC later withdrew its reparations order), stating that a reparations order imposed an immediate liability which "persisted until payment", and that the carrier "may not reasonably be held . . . bound to await suit or delay adjudication . . . while expenses of litigation, interest, and fees for its adversary's counsel accumulated".³⁷

³⁶ *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217, 239 (1925); *Hope Cotton Oil Co. v. Texas & Pacific Ry. Co.*, 10 ICC 696, 704 (1905).

³⁷ The Court's comment in *Meeker & Co. v. Lehigh Valley R. Co.*, 236 U.S. 412 (1915) that the reparation order provided an evidentiary presumption was in reply to an attack upon the constitutionality of the provision according *prima facie* weight to ICC reparations orders. It is not authority for the proposition that a carrier had no right to direct review.

If, as there held, a carrier can pay a reparations award and thereafter maintain a petition for reconsideration of the award with the agency, it logically should also be permitted to seek judicial review if the agency refuses to reconsider. Yet if defense of an enforcement suit is the exclusive means for review, a carrier which has succumbed to the coercive effect of Section 16 of the Interstate Commerce Act, or Section 30 of the Shipping Act, would have no means to obtain review. The very policy of the Act to encourage payment would be defeated, and review would be denied the carrier. The statute cannot have been intended to have this result.

Any remaining doubt must be resolved by later decisions that the term "any order" as used in the Hepburn Act, carried forward into the Urgent Deficiencies Act of 1913 and then codified, includes orders with respect to the payment of money. *United States v. ICC*, 337 U.S. 426 (1949); *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960); cf. *St. Louis & O'Fallon R. Co. v. United States*, 279 U.S. 461, 482 (1929). *United States v. ICC* held that a shipper might secure review of an ICC order denying reparations, and that such review was under the Urgent Deficiencies Act (38 Stat. 208), although not under three-judge court procedure. In *Pennsylvania R.R.*, the Court found that an ICC order finding certain rail rates "unjust and unreasonable" had "legal consequences" (citing *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 131, 132, 143 (1939)); was "essentially one 'for the payment of money'"—and that the railroads "had a right to have the Commission's order reviewed"

under 28 U.S.C. § 2321, in a one-judge district court (363 U.S. 202).³⁸

D. The "Policy" Considerations Urged by the Government Are Neither Persuasive Nor Applicable to Hobbs Act Review of Maritime Commission Reparations Orders

Recognizing that the statutory language does not support it, the Government admits (brief, p. 24) that its "major focus is on considerations of policy". There are no policy considerations applicable to Shipping Act reparations orders of sufficient importance in any event to warrant disregard of the unqualified language of the Hobbs Act and Section 31 of the Shipping Act.

This aside, the Government again makes the error of asserting that the policy considerations in this case are no different from those in *Atlantic Coast Line*. We join in the pertinent response made there by the railroad respondents and submit further that the very fact that ICC orders were excluded from Hobbs Act review, and at the ICC's request, proves that neither

³⁸ We see no point in trying to untangle the web of *Pittsburgh & W. V. Ry. Co. v. United States*, 6 F. 2d 646 (W.D. Pa. 1924); *Brady v. I.C.C.*, 43 F. 2d 847 (N.D. W. Va. 1930), *aff'd*, 283 U.S. 804; and *Baltimore & O. R. Co. v. United States*, 87 F. 2d 605 (C.C.A. 3rd 1937), cited by the Government. They were all decided after passage of the Shipping Act; and make no mention of *Southern Ry. Co. v. United States*, 193 Fed. 664 (Com. Ct. 1911) and *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Com. Ct. 1911). They seem inextricably related to the negative order doctrine enthroned in *Procter & Gamble Co. v. United States*, 225 U.S. 282 (1912), which along with the *Brady* case, was overruled in *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939). With the perspective of the last cited case and *Pennsylvania R.R.*, it would appear that the Government's present position may itself be but a vestigial remnant of the discredited *Procter & Gamble* philosophy.

it nor the Congress regarded the same considerations applicable to both agencies.³⁹

The great volume of business under the Interstate Commerce Act—an important consideration prompting the ICC to request exclusion from the Hobbs Act—is itself a material difference. By contrast, by Consolo's count, there were no more than five reparations awards under the Shipping Act in the first forty-five years of its history (1916-1961) (R. 622).

The Government's "policy" arguments fall into two categories, as they must. First, it alleges policy grounds for holding that the Hobbs Act did not carry out the clearly expressed intent of its sponsors—to provide a new, improved, and uniform system of review for all reviewable orders of the Maritime Commission. Second, it alleges grounds for carving out of section 31 of the Shipping Act, which provides for review of "any order", an unexpressed exception for reparations orders. In both aspects the policy considerations relied upon are spurious.

As to the Hobbs Act, the Government's brief (p. 16) refers to three Congressional objectives: to eliminate the necessity for two trial-type proceedings, to eliminate three-judge district courts, and to eliminate direct appeals to this Court. The Government would confine the Hobbs Act to cases where these objectives are accomplished. The first objective is irrelevant on the question whether reparations orders are covered; what Congress had in mind was the practice in certain suits for the review of rate orders (usually where the carrier alleged confiscation) of introducing evidence in the review proceeding. The Hobbs Act itself provides

³⁹ Hobbs Act Hearings, *supra*, p. 160.

(section 7(c)) for a reference to a district court to take additional evidence in appropriate cases, thus giving rise to two trial-type hearings. Also, conceding that court of appeals review may not eliminate the need for an enforcement suit, nevertheless that is equally true of review of orders other than those for the payment of money.⁴⁰

As a practical matter, where a carrier has received an adverse court of appeals ruling in the Hobbs Act proceeding, its motivation for prompt payment is substantially increased. The coercive effect of the provisions in section 30 giving the award *prima facie* weight, reinforced by the court of appeals decision as to the validity of that order, plus provision for attorneys' fees and interest, will certainly provide a powerful incentive for payment. It is therefore a reasonable assumption that in a substantial number of cases there will be no necessity for a further enforcement suit by the shipper. In that event the shipper is clearly advantaged.

As to the remaining objectives stated by the Government, it concedes that the Hobbs Act embraces a broader class of cases than those formerly brought in three-judge courts and subject to direct appeal. For example, shipper suits to set aside orders denying repatriation, which formerly were cognizable in one-judge

⁴⁰ Such a possibility exists whenever a suit is brought to enjoin or set aside judicially enforceable agency action. E.g., *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Parker v. Brown*, 317 U.S. 341 (1943); *Columbia Broadcasting Co. v. United States*, 316 U.S. 407 (1942); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *Shields v. Utah Idaho Central R.R.*, 305 U.S. 177 (1938); *Packard v. Banton*, 264 U.S. 140 (1924); *Ex Parte Young*, 209 U.S. 123 (1908).

courts, are subsumed under the Act. *United States v. ICC*, 337 U.S. 426 (1949), so held (in substance) with respect to ICC orders; and *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2d 1954), *cert. denied*, 348 U.S. 839, and *D. L. Piazza Co. v. West Coast Line*, 119 F. Supp. 937 (N.D. Ill. 1953) so held with respect to Shipping Act orders. As the right of direct appeal was co-extensive with the three-judge court procedure, it is similarly plain that the Hobbs Act embraces cases in addition to those where direct appeal was formerly available.

The policy arguments for reading an exception into section 31 are equally untenable. The Government alleges that because reparations orders are of lesser public importance than orders having future effect, the agency should not be called upon to defend the former in suits to set them aside. It also urges that such suits would deprive the shipper of the procedural advantages prescribed for him in enforcement suits.

Government agency participation is inconsequential. As stated above, the volume of Shipping Act reparations orders is negligible. In addition, reparations orders must, of course, be based upon an agency finding of violation of the Shipping Act, normally made in conjunction with an order having declaratory or future effect and thus unquestionably subject to Hobbs Act review. Moreover, the Government concedes that the reparations order itself is subject to Hobbs Act review at the shipper's instance. Thus the underlying controversy, the parties, the issues, the record⁴¹ and the identical order may already be before the court of

⁴¹ The reparations order may be based upon the identical agency record or where, as here, there has been a deferral of the reparations issue, the original record, plus a supplemental record.

appeals in a Hobbs Act proceeding, in which the agency is a party. Even where there is no such review in collateral aspects, the agency may be called upon to intervene in an enforcement proceeding, where the validity of its order is called in question in a suit between private parties. The present case, for example, entails questions on the merits, as to the agency's powers, of sufficient importance to have warranted this Court's including them in the writ of certiorari; it is inconceivable that the agency would always be willing to have such issues tried in an enforcement action without its participation.

In addition, there are countervailing policies overriding any inconvenience to the agency in defending reparations orders. One is procedural convenience. If review of the award of reparations were confined to the defense of an enforcement suit, the carrier would have an appeal as of right to a court of appeals, subject thereafter to a writ of certiorari by this Court. Direct review of the agency order under the Hobbs Act eliminates one full step, where the carrier's petition is successful; and where the Hobbs Act appeal is rejected, it may eliminate the need for any further enforcement proceeding. Even if a further enforcement proceeding is necessary, the scope of both that proceeding and any subsequent appeal (as of right) to a court of appeals will be reduced to the extent of the issues tried in the Hobbs Act proceeding. The court below clearly held that issues decided in a Hobbs Act proceeding as to the validity of the agency order—"questions of law . . . matters of jurisdiction and fairness of administrative procedure" (R. 662), will have a res judicata effect in any subsequent enforcement proceeding. Thus the suggestion that there is a "double" review is false.

Conversely, if the Court should hold that enforcement suits provide the exclusive mechanism for review and that "complete review" may be obtained by the carrier in such a proceeding,⁴² the carrier must be entitled in the enforcement proceeding to attack the validity of the agency order, its rulings on questions of law, agency jurisdictional questions and questions of fair procedure. This would ordinarily be by motion to the district court in the absence of the jury. To the extent that issues in an enforcement suit may be subject to further proceedings, *e.g.*, upon the question of damages in an unjust discrimination case, such proceedings still remain, even after the court has upheld the validity of the agency order. The net result is that even in an enforcement suit, assuming no Hobbs Act review, there are two distinct steps. The sole effect of the Hobbs Act under the ruling below is to transfer the first of these steps—the phase which is truly the review phase—to the court of appeals. Congress selected the court of appeals as the court best suited to review functions and the district courts as those best suited to trial functions and enforcement responsibilities, if either or both should be necessary.

Nor is there merit to the Government's argument that this procedure deprives the shipper of the procedural advantages provided by the Shipping Act. The shipper—in whose behalf the Government's argument is ostensibly made—is in fact advantaged by Hobbs Act review. Although he has a right to intervene (with no exposure to liability for costs), he is not bound to do so. If he chooses he may rely upon the Government to defend its order.

⁴² For the reasons stated in the respondent's brief in *Atlantic Coast Line*, pp. 15-18, Flota does not believe that review by defense of an enforcement suit is either "complete" or satisfactory.

Thus, although the shipper may have no choice of forum and no right to attorney's fees in a Hobbs Act review proceeding initiated by the carrier, he is compensated by the saving of a step in the litigation and by having the Government represent his interests. If an enforcement proceeding becomes necessary, he still has the advantages accorded by section 30. For that matter, nothing in the Hobbs Act or elsewhere prevents the shipper from instituting his enforcement suit while the Hobbs Act proceeding is pending, or before it is instituted. The pendency of two proceedings may afford the reviewing courts flexibility to decide, case-by-case, which, if either, of the two should be stayed pending the outcome of the other.⁴³

⁴³ The possibility of a party's proceeding with cases raising the same issue simultaneously in courts of different states (e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958)), in courts of equity and courts of law, or in state and federal courts (e.g., *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959)) is so common as to be unworthy of remark and has never of itself been regarded as a basis for refusing jurisdiction. Cf. *McClellan v. Carland*, 217 U.S. 268 (1910). In *United States v. New York, N. H. & H. Ry. Co.*, 276 F. 2d 525, 537-547 (C.A. 2d 1960), the court of appeals held that review of the lawfulness, under the Interstate Commerce Act, of a railroad securities issue could and must proceed simultaneously in the court of appeals and in the Supreme Court.

In addition, a possibility of double review exists whenever there is more than one route to review of an agency order, and such occasions are frequent. Random examples from Maritime Board practice include *Montship Lines, Ltd. v. FMB*, 295 F. 2d 147 (C.A.D.C. 1961) and *Kerr S.S. Co. v. United States*, 284 F. 2d 61 (C.A. 2d 1960); and *Associated-Banning Co. v. United States*, 247 F. 2d 557 (C.A.D.C. 1957), and *Howard Terminal v. United States*, 239 F. 2d 336 (C.A. 9th 1956). Compare, with respect to ICC orders, the double review in *Denver & R.G.W.R. Co. v. Union Pac. R. Co.*, 351 U.S. 321 (1956); and see *Seaboard Airline R. Co. v. Daniel*, 333 U.S. 118 (1948); *Illinois C.R. Co. v. PUC*, 245 U.S. 493 (1918); *Armour & Co. v. Louisiana So. Ry.*, 190 F. 2d 925 (C.A. 5th 1951).

**II. IN ANY EVENT, THE EXERCISE OF JURISDICTION BY
THE COURT BELOW WAS PROPER IN THE CIRCUM-
STANCES OF THIS LITIGATION**

The Government concedes that the Court of Appeals had jurisdiction to entertain Flota's challenge to the Commission's reparations order, in the circumstances of this litigation, whatever the ruling on the more general issue discussed above (its brief, pp. 37-43). This alternative basis for jurisdiction (R. 661) is now contested only by Consolo.

When Flota's petition in No. 16,369 was filed, the Court of Appeals already had before it Flota's petition in No. 15,330, for review of the Board's July 1959 finding of violation and Consolo's petition in No. 16,366 for review of the Board's March 1961 reparations order, by which Consolo sought to increase the amount thereof. The jurisdiction of the Court of Appeals to review the petitions in Nos. 15,330 and 16,366 was at no time challenged before the Court of Appeals. It seems beyond question: Hobbs Act, Section 2; *D. L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2d 1954), *cert. denied*, 348 U.S. 839. *Cf. United States v. ICC*, 337 U.S. 426.

The underlying controversy was the same in all three cases; substantially the same agency record was involved, "the same parties, the same disputes, the same claims for money damages, and the same statutes".⁴⁴ Flota's challenges to the validity of the reparations order were as relevant to Consolo's attempt to increase the award as they were to Flota's attempt to have the award set aside—as was also the lower court's ultimate holding that the Commission abused its discretion in awarding reparations (R. 698). After his initial

⁴⁴ *United States v. ICC*, 337 U.S. at 443.

motion to dismiss or to require Flota to post a bond was held in abeyance, Consolo himself urged that "Flota has chosen to bring its review of the award here, rather than awaiting a suit in District Court" (R. 648), and that "All the facts are before the court, and the controversy is ripe for final decision" (R. 650).

Under these circumstances, an independent basis of jurisdiction to entertain Flota's challenge to the reparations award was not necessary. The doctrine of ancillary jurisdiction and considerations of procedural economy and fairness, for which the Government's brief provides authority,⁴⁵ constitute sufficient jurisdictional basis for the lower court's action.

This conclusion follows also from Section 9(a) of the Hobbs Act (5 U.S.C. § 1039(a)), which provides that

"The court of appeals in which the record on review is filed, on such filing . . . shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."

Once the court's jurisdiction was invoked by Consolo and the record filed, the court below had jurisdiction to determine the validity of the orders in question—whether or not it otherwise would have had jurisdiction.

⁴⁵ See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909); and *Luckenbach Steamship Company v. United States*, 179 F. Supp. 605, 614 (Del. 1959), *aff'd in part* 364 U.S. 280. *Cf.* 1 Barron & Holtzoff, *Federal Practice and Procedure* 94 (Wright ed. 1960).

Consolo's brief in this Court questions the reasoning of the *Piazza* case, though in reliance thereon he invoked the Court of Appeals' jurisdiction by his own petitions in Nos. 16,366 and 18,230 (R. 491, 634, 676; petition for certiorari, p. 5). There ought to be a limit on the number of times a party can reverse its position in litigation—whether he be a private claimant as Consolo, or the Government, and whether or not the issue is jurisdictional.⁴⁶ In any event the answer to Consolo's new position on *Piazza* is that the Hobbs Act coverage was intended to cover all reviewable orders and was not intended to be limited to matters previously subject to three-judge court review (see pages 31, 45-46, *supra*).

III. THE COURT BELOW DID NOT ERR IN VACATING THE COMMISSION'S ORDER

A. The Commission Was Not Compelled Automatically to Award Reparations Following Its 1959 Report

1. Consolo professes to find in the lower court's action "hitherto unknown standards of decision and review" (his brief, p. 30). The first such "standard" is reflected in the lower court's holding in 1962 that the mere fact the Board had found in its 1959 report that "Flota's practices . . . constitute a violation of Sections 14 Fourth and 16 First of the [Shipping] Act" (R. 9-10), did not mean that it was automatically required to grant reparations for the period thereto,

⁴⁶ "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties.'" *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932); *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525-26 (1931). See also *Angel v. Bullington*, 330 U.S. 183 (1947); and *Flota's Brief in Opposition to Petition herein*, pp. 2-4.

or that "the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed" (R. 666-67).

On remand the Commission stated its agreement with the court's interpretation (R. 503, 512-13). On further appeal, Consolo raised no issue with respect to the court's earlier holding or the right of the Commission to examine the circumstances of the violation, and did not contend that the Commission did not have discretion to deny reparations, if an award thereof would be inequitable (see Prehearing Stipulation, R. 679-683). He should not now be permitted to raise that issue in this Court. Cf. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The Government does not join in Consolo's argument. The Government's Memorandum, pp. 10-11, in response to Consolo's petition herein, stated:

"The rulings below merely recognize that, under Section 22, the direction to pay reparations is discretionary with the Commission. . . . The Interstate Commerce Commission exercises a very similar discretion when it finds that a rate or practice is unreasonable as to the future but not as to the past, and accordingly forbids the practice but denies reparations. We believe that there is no difference in substance . . ."

Consolo's brief (p. 32) acknowledges:

"We do not, of course, wish to be understood as arguing that the Shipping Act favors inequitable reparation awards."

—though that is the necessary effect of its contention.

The court's holding in any event was correct. The posture of the controversy before the Court of Appeals must be understood. In the 1957-59 phase of the agency proceeding, the evidentiary hearing commenced upon all issues, including reparations. After Consolo has presented virtually his full case, excepting only "a little bit more on the issue of reparations; (R. 122), and prior to the commencement of Flota's case, the Examiner "severed" and deferred testimony on the reparations issues (R. 109-122).

In its 1959 decision the Board found—upon the record containing virtually all of Consolo's testimony in all issues, but not Flota's case on reparations—that Flota's practices "constitute a violation" of Sections 14 and 16 of the Shipping Act. The Board did not state when the violation commenced, vis-a-vis Consolo, or purport to rule upon any aspect of the reparations issue (R. 9-10). Its order stated that the proceedings were to be held open "for further proceedings on the claims of complainants for reparations, if *any* . . ." (R. 13).

Thereafter the supplemental hearings were held and Flota completed its testimony on the reparations issue, including that of its principal officer who testified as to circumstances surrounding both the execution of the 1955 contract, the exercise of Panama Ecuador's option in 1957, and the denial of space to Consolo in 1957 (R. 430-40). However, in its reparations decision thereafter, the Board refused to consider evidence on any issue except "the measure of reparation", and held that the earlier finding of violation precluded Flota from contending that it had not acted unjustly, unfairly or unreasonably insofar as Consolo was concerned, prior to the Board's 1959 ruling (R. 274).

It was in this context that the Court of Appeals held in 1962 that

“The Board may have erroneously believed (1) that it was required to grant reparations once it had found a violation of the Act, or (2) that all of the issues as to reasonableness or equity of Flota’s conduct were determined in the first phase of the proceeding” (R. 666).

and that while the Board could properly find after the first hearing that Flota had violated the Act (R. 667)

“... this does not mean that the circumstances of the violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed” (R. 667).

In *Baer Bros. Mercantile Co. v. Denver & R. G. W. R. Co.*, 233 U.S. 479, 486, 488 (1914) this Court declared that

“awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity to prevent further injury to the public.”

It also pointed out that there are cases in which

“a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is awarded even though a new rate be established for the future. *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 Inters. Comm. Report 43” (233 U.S. at 488).

Measured against the *Baer Bros.* analysis, it is clear that the Board's 1959 violation finding was in a quasi-legislative capacity, and did not foreclose it on the later reparations record from examining the past conditions, in its quasi-judicial capacity, to determine whether reparations should be awarded. That is the effect of the lower court's holding in this instant case, and the Government's Memorandum above quoted so recognizes.

The lower court employed the word "inequitable" in the same sense as the statute employs the words "unfairly", "unjustly" and "unreasonably". It specifically stated in its 1964 opinion that "The standard of violation has built into it the concepts of fairness and reasonableness; discriminations and preferences are not per se prohibited" (R. 693) and it stressed the importance of the particular "factual setting" of each claim (R. 693).

2. The lower court and the Commission also referred to the discretionary nature of the reparations power vested in the Commission by Section 22 of the Shipping Act, 1916, which is an alternate justification for its holding (R. 503, 666, 690-91, 698). Section 22 provides only that the Commission shall issue such order "as it deems proper", and "may" award reparations (46 U.S.C. § 821). Considerations of "fairness" and "justice" have long been found to require the withholding of damages or reparations under the Interstate Commerce Act, particularly where, as here, the claimed reparations period is prior to enunciation of a new rule of law or standard of conduct and there-

fore involves retroactivity.⁴⁷ The relevance of such considerations has been recognized under the National Labor Relations Act,⁴⁸ the Securities and Exchange Act,⁴⁹ and in a variety of other situations.⁵⁰

B. The Court Properly Found That The Commission's Award Was Not Supported by Substantial Evidence

1. Consolo's final contention is that the court below made its "own findings of fact" contrary to the Commission's findings, and therefore applied an "improper standard for review".

⁴⁷ *Johnson Seed Co. v. United States*, 90 F. Supp. 358 (W.D. Okla., 1950), *aff'd* 191 F. 2d 228 (C.A. 10th, 1951); *Delaware, Lackawanna & Western Coal Co. v. R.R. Co.*, 46 I.C.C. 506, 509 (1917); *West Coast Lumbermen's Assoc. v. A. & S. Ry. Co.*, 104 I.C.C. 695, 702 (1925); *Boston Wool Trade Assoc. v. Director General*, 69 I.C.C. 282, 309 (1922); *Anadarko Cotton Oil Co. v. A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 50 (1910). See also *Detroit, G.H. & M. Ry. Co. v. Interstate Commerce Com'n.*, 74 Fed. 803, 822-23 (C.C.A. 6th, 1896). Cf., *Baer Bros. Mercantile Co. v. Denver & R.G.W.R. Co.*, 233 U.S. 479, 486 (1914).

⁴⁸ E.g., 29 U.S.C. § 160(c), and *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 198 (1941) ("The remedy of back pay, it must be remembered is entrusted to the Board's discretion; it is not mechanically compelled by the Act.")

⁴⁹ *Securities and Exchange Com'n., v. Chenery Corp.*, 332 U.S. 194, 203 (1947). ("... such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or the legal or equitable principles.")

⁵⁰ *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932); *Gelpeke v. Dubuque*, 68 U.S. 175 (1894); *Douglass v. Pike County*, 101 U.S. 677 (1880); 15 U.S.C.A. § 71s(a); and 26 U.S.C.A. § 7805(b). See also *Leedom v. International Brotherhood of Elec. Wkrs.*, 278 F. 2d 237 (C.A.D.C. 1960); and *Simpson v. Union Oil Co.*, 377 U.S. 13, 24, 25 (1964). ("We reserve the question whether when all the facts are known there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today.")

The Court of Appeals' 1964 decision was that the Commission on remand had "ignored the guideposts of our original decision" (R. 689), had "ignored . . . the substantial weight of the evidence before it" (*ibid.*), and had "abused" its discretion (R. 698). There is in the Court's action no departure from the normal standards of review.

The case was before the Court of Appeals not once, but twice, and each time was thoroughly briefed and argued by the Government, Consolo and Flota. That court's opinions evidenced painstaking review, and an intimate familiarity with the record. In its first opinion (R. 651-67), the court declined to rule upon the ultimate reparations issue, and instead remanded the case to the Commission (R. 666-67). It held, however, that Flota had "marshalled substantial evidence in support of its contention" that it should not be compelled to pay reparations for the period prior to the Board's July 1959 decision, and then proceeded to consider and discuss a number of points in issue, establishing guideposts for future consideration by the Commission (R. 665-67, 668-89).

On remand the Commission's report—written by its attorneys⁵¹ who had previously appeared as advocates against Flota (R. 480-84, 492, 526-27)—disregarded the guideposts established by the Court and, incredibly, did not even mention the court's earlier finding of "substantial evidence" supporting Flota's good faith.

In its second opinion thereafter, the court stated that it had hoped further consideration by the Com-

⁵¹ Flota contends that their participation in the formulation and writing of the Commission's remand opinion was highly improper and unlawful, a contention upon which the Court of Appeals found it unnecessary to rule (R. 698). See pp. 65-66, *infra*.

mission "would throw light on our initial impressions"; and that it had been "prepared to affirm the Commission if it could establish that the circumstances were such as to not make it unfair to assess damages against Flota" (R. 688-89); but that "careful examination of [the Commission's] opinion, the evidence relied upon by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignored not only the guideposts of our original decision, but also the substantial weight of the evidence before it" (R. 689). The court thus expressed its conclusion that upon the record as a whole, there was lacking substantial evidence to support the Commission's findings and order. This conclusion was not a departure from the "substantial evidence" rule but merely an application of it.

In explanation of its conclusion, the court then discussed the individual facets of the controversy, in great detail (R. 689-98). The court's discussion was a demonstration of the error of the Commission's findings and reasoning in support of the court's conclusion that the Commission had ignored the substantial weight of the evidence before it, and was not *de novo* fact finding, as Consolo suggests.

In that discussion the court stated that "an objective and rational examination of all the evidence reveals such equitable factors . . ." that "make reparations an inappropriate remedy in this case"; that it was unable to find a basis for the Commission's new and belated challenge to Flota's "good faith"; that Flota had acted with "substantial justification"; that the law was "unsettled" during the period in question; that Flota had acted as "promptly as possible" and that there was "no evidence Flota in any way benefitted by its exclusion of Consolo"; that the latter bore, at

most, only the loss of "speculative" and "unrealized" profits (R. 690, 698).

Having thus demonstrated in detail the lack of basis for the Commission's findings on remand, the court concluded:

"In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act in imposing reparations on petitioner." (R. 698).

The Court below did not regard the question, as Consolo says, as "whether there is substantial evidence showing the contrary of what the agency did" (Consolo's brief, pp. 38-39). The court below recognized, by its very act of remand in 1962, that the question was not merely the substantiality of evidence supporting Flota's contention. The question put by Consolo, "whether there is a basis in the record for what the agency *did* find", was answered in the court's second opinion—in the negative (R. 687-98). The court thus acted with complete propriety and wholly within traditional limitations of review of administrative agency action.⁵²

The foregoing answers Consolo's contention and should end this Court's inquiry. Consolo expressly

⁵² Section 10(e), Administrative Procedure Act, 5 U.S.C. § 1009 (e); *Universal Camera Corp. v. National L.R. Bd.*, 340 U.S. 474 (1951) (on remand see 190 F.2d 420); *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Federal Trade Com. v. Standard Oil Co.*, 355 U.S. 396 (1958); *Hall v. Celebrezze*, 314 F.2d 686 (C.A. 6th 1963); *Celanese Corporation of America v. N.L.R.B.*, 291 F.2d 224 (C.A. 7th 1961), cert. denied, 368 U.S. 925; *Local No. 3, etc. v. NLRB*, 210 F.2d 325 (C.A. 8th 1954), cert. denied, 348 U.S. 822.

states that he is "not expecting this Court to review the evidence" (his brief, p. 37, n. 13).

2. The Government, however, appears to have reversed its position once again. It opposed the petition for writ of certiorari, except as to the jurisdictional issue, in its Memorandum of May 1965 (pp. 10-13), and there stated that "We do not believe that further review of the other questions presented by the petition is necessary at the present time", and that "The instant case . . . does not present the 'rare instance' calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings". Even in its brief to this Court, the Government recognizes that the remaining issue is essentially a private damages claim, and states "we leave the argument on the merits of the Court of Appeals result to be made principally by petitioner" (its brief, p. 44). Then despite these disclaimers—and despite the fact that Consolo does not ask the Court to review the evidence—the Government's brief proceeds for eight pages to attack the merits of the Court of Appeals judgment, and Flota's good faith in the 1957-1959 claimed reparations period.

Answer may be found in the Government's own May 1965 Memorandum, p. 12:

"In the circumstances of the present case, however, the reviewing court's redetermination of the equities did not involve a flagrant disregard of the limitations of review. Its decision was inextricably intertwined with its conclusion as to the unsettled nature of the law at the time of Flota's violation; it believed that the Commission erred in ruling that there could have been confusion as to the guiding rules. On this purely legal issue, the Commission's determination was entitled to less deference than on other matters."

—concluding that this Court's intervention was unnecessary.

It was held in *NLRB v. Pittsburgh Steamship Company*, 340 U.S. 498, 502, 503 (1951):

“The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeal involving solely a fair assessment of the record on the issue of unsubstantiated, ought to lead us to do no more than decide that there was such fair assessment when the case is here, as this is, on other legal issues.”

This rule has been applied in cases in which a Court of Appeals has reversed the agency's conclusions of fact on “good faith” issues, such as here involved. *Federal Trade Com. v. Standard Oil Co.*, 355 U.S. 396 (1958); *NLRB v. American National Insurance Company*, 343 U.S. 395, 410 (1952). The circumstances and findings recited above, the court's restraint in remanding to the Commission in 1962, its careful answers to the arguments contained in the Commission's report on remand, the very attention to detail manifested in its opinion, all established that it made a “fair assessment” of the record. *NLRB v. Pittsburgh Steamship Company*, *supra*.⁵³

The Government's factual arguments with one exception, were twice presented to the Court of Appeals,

⁵³ The fact that the key factual issue here is Flota's “good faith”, makes familiarity with the entire record absolutely essential to a just result. However, there is an inherent impossibility in a case of the factual complexity of this one, where the major preoccupation is with intricate jurisdiction issues, of adequately dealing with the factual record. These considerations provide additional reasons for the Court here to decline to review the factual record.

carefully examined by it, and rejected. That single exception appears at page 47 of the Government's brief where it argues that Flota had an opportunity to cancel its contract with Panama Ecuador in 1958. This is a discredited and abandoned Consolo argument, which even the authors of the Commission's report on remand rejected. No mention of it appears in the Commission's report (R. 501-14). Any matter relating to events prior to August 23, 1957 may also be disregarded, for it was held by the Board and Court of Appeals that Flota violated no duty owed to Consolo prior to that date (R. 277-78, 663).

The heart of the critical "good faith" issue⁵⁴ revolves around whether the law was "settled" or "unsettled" in the 1957-59 reparations period—an issue as to which the Commission can lay no claim to special competence. In this connection, at pp. 4-5, and pp. 44-45 the Government's brief states that the Board in June 1953 had "made a study of banana carriage in depth and had held that . . . a carrier could not pick and choose among qualified banana shippers", *Consolo v. Grace Line Inc.*, 4 F.M.B. 293 (1953); and that the Board "reaffirmed" the 1953 decision in *Banana Distributors Inc. v. Grace Line Inc.*, 5 F.M.B. 278, on April 29, 1957.

The lower court discussed these cases in detail at R. 691-696, especially at R. 691-692—which discussion the Government's brief ignores. The fact is that the 1953 proceeding was a private complaint case not involving

⁵⁴ The Government advised the lower court, "Whether it is equitable to award reparations to Consolo depends upon the persuasiveness of Flota's protestations of good faith". Brief on Behalf of Respondents, On Petition for Review of Order of the Federal Maritime Commission, submitted to the Court of Appeals in March 1964, in case Nos. 18,230 and 18,235, p. 19; see also pp. 9, 11. A true copy of this brief has been lodged with the Clerk of this Court.

either Flota or the industry generally, as the Court might infer. Moreover it never proceeded to a final order, was settled on terms of which the Commission was aware, but which were substantially at variance with its report; and was so little regarded as a precedent that instead of being "reaffirmed" in the Board's 1957 opinion, it was not even mentioned therein—except upon a minor point not here relevant. Further, Flota's problem until it finally entered into a contract with Panama Ecuador in 1955—after advertisements to which no one responded—was finding *any* shipper for its reefer space, not in picking and choosing between shippers. (R. 77-82).

As to the 1957 decision—which like the 1953 report was contrary to lay standing practice—there was no final disposition until August 20, 1957, long after Panama Ecuador had exercised its renewal option and the renewal contract had been executed (R. 187-91, 195-99, 430-38, 442); and thereafter the 1957 decision was *reversed* by the Court of Appeals for the Second Circuit in *Grace Line Inc. v. FMB*, 263 F. 2d 709 (C.A. 2d 1959).⁵⁵ The Board in its first reparations decision said Flota should have accepted the Board's decision, but did not even mention the reversal (R. 276). And the Commission's second reparations report, written by Flota's adversaries on its staff, terms both the 1953 and 1957 reports as "authoritative pronouncements" (R. 505). Yet the Government charges *Flota* with lack of "good faith", and the

⁵⁵ A supplemental Board report, 5 F.M.B. 615 (1959), was affirmed, 280 F.2d 790 (C.A. 2d 1960), *cert. denied*, 364 U.S. 933, long after the reparations period here in question. As the court below found, "Flota's counsel had good grounds for believing that the [1957] Grace Line report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract" (R. 693; see 690-97).

Court of Appeals with invading the Commission's discretion. With such a performance spread on the record before it, the Court of Appeals could not reasonably have done anything other than it did.⁵⁶

C. There Are Additional Issues Upon Which The Judgment Below May Be Sustained

There were additional issues before the Court of Appeals, which it found unnecessary to consider. That they are issues of substance is shown by the following:⁵⁷

1. *Improper commingling of advocacy and advisory or decisional functions.* The Commission's own minutes disclose that its General Counsel and Assistant General Counsel, Messrs. Pimper and Mitchell, having previously acted as advocates against Flota (R. 480-84, 492, 651), thereafter intimately participated and advised in the Commission's deliberations in the remanded proceeding. Acting *ex parte*, without notice to Flota or opportunity to object or except, they formulated the Commission's findings, and submitted a proposed report and order which the Commission adopted verbatim (R. 524-27). It is Flota's contention, upon which the lower court found it unnecessary to rule (R. 698), that the Commission thereby violated constitutional and statutory prohibitions against commingling advocacy and decisional functions in the

⁵⁶ As to the Government's argument, (pp. 3-5), twice made to and twice rejected by the court below, that Flota delayed the Board proceeding, the Government persists in confusing Flota's efforts to obtain action on its own petition for declaratory order separately from the complicated reparations issues in Consolo's complaints. See R. 49-51, 55-56, 60-62. The Court of Appeals comments are at R. 665-66, 697. The Government at p. 45, note 34 of its brief, quotes Flota's trial counsel out of context (R. 134).

⁵⁷ There are undecided questions also as to subsidiary issues involving principally the calculation of damages (R. 667, n. 19; 672-75).

same persons.⁵⁸ The procedure employed neither the substance nor the appearance of fairness.

2. *Measure of Damages.* The Commission applied a "measure of damages" based on "refusal to carry" cases, *i.e.*, actions involving breach of the common law obligation of a common carrier "to transport goods duly tendered for carriage", or a statutory codification thereof. But the violations for which reparations are sought are purely statutory violations, of Sections 14 Fourth and 16 First, Shipping Act, 1916, the essence of which is discrimination between shippers.⁵⁹ The Court held in *ICC v. United States*, 289 U.S. 385, 389-90, 393 (1933) that

"When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper (citing cases . . .). The question is not how much better off the complainant would be today if it had paid a lower rate. *The question is how much worse off it is because others have paid less.*"

⁵⁸ See *Morgan v. United States*, 304 U.S. 1, 19-20 (1938); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Amos Treat & Co. v. Securities and Exchange Commission*, 113 App. D.C. 100, 306 F.2d 260 (1962); *Trans World Airlines v. Civil Aeronautics Board*, 102 App. D.C. 391, 254 F.2d 90, 91 (1958); *Administrative Procedure Act*, Section 5(c) (5 U.S.C. § 1004(c) and Section 8(b) (5 U.S.C. § 1007(b)); *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 56.

⁵⁹ Contrary to Consolo's implication, brief pp. 13-14, 33-35, it has never been held that Flota violated any common law duty to Consolo, if a cause of action for discrimination existed prior to 1916 and survived, which is highly doubtful. See *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 184, 200-201 (1913); *T. I. M. E. v. United States*, 359 U.S. 464, 473-74 (1959). The court in *Grace Line v. FMB*, 280 F.2d 790, 792 (C.A. 2d 1960), cert. denied, 364 U.S. 933, assumed *arguendo* that the carrier there did *not* owe a common law duty to banana shippers.

The case involved discrimination in rates but its reasoning is equally applicable where the discrimination is in service.

Here the Commission should have inquired "not how much better off [Consolo] would have been today if it had" received space from Flota, but "how much worse off" he is because his (alleged) competitor Panama Ecuador used the space. The loss of profits from an anticipated expansion in business by Consolo is not within this rule.

In its 1962 opinion, the court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh"; in its 1964 decision, it referred to Consolo's claimed damages as the loss of "speculative" and "unrealized" profits. (R. 690, 698).

Flota believes the foregoing constitute sufficient alternative grounds for sustaining the lower court's action. However, if the resolution of these issues becomes necessary, it may be more appropriate for this Court to remand the case to the Court of Appeals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 1965

APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*:

Section 22 (46 U.S.C. 821):

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

* * * * *

Section 29 (46 U.S.C. 828):

In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 30 (46 U.S.C. 829):

In case of violation of any order of the Federal Maritime Board for the payment of money the person to

whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Section 31 (46 U.S.C. 830):

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

The Administrative Orders Review Act (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.*:

Section 2 (5 U.S.C. 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 * * * .

Section 3 (5 U.S.C. 1033):

The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Section 8 (5 U.S.C. 1038):

* * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is

not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. * * *

Section 9(a) (5 U.S.C. 1039(a)):

Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

The Hepburn Act of 1906, 34 Stat. 584 *et seq.*:

Section 5 (34 Stat. 590-92):

That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

“SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

“If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the

United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

“In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of

any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

“Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

“The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

“It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

“Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

“The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

“It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission

may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

“If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

“From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

“The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of ‘An Act to expedite the hearing and determination of suits in equity, and so forth,’ approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not

less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

"The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals."

The Mann-Elkins or Commerce Court Act of 1910, 36 Stat. 539 *et seq.*:

Section 1 (36 Stat. 539):

That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or pen-

alty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

• • • • •

Section 3 (36 Stat. 5342-43):

That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

• • • • •

The Judiciary Act of 1911, 36 Stat. 1087 *et seq.*, 28 U.S.C. Section 1336:

Section 24 (36 Stat. 1091-92):

The district courts shall have jurisdiction as follows:

• • • • •

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

• • • • •

Section 207 (36 Stat. 1148-49):

The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the

judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

Section 208 (36 Stat. 1149):

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. * * *

Section 209 (36 Stat. 1149-50):

The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy

thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Section 211 (36 Stat. 1150):

All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Section 213 (36 Stat. 1151):

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

The Urgent Deficiencies Act of 1913, 38 Stat. 208, 219, 220:

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter

covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court.

* * * *

The Judicial Code, 28 U.S.C. 1 *et seq.*:

Section 1336:

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

* * * *

The Administrative Procedure Act of 1950, 60 Stat. 237 *et seq.*, 5 U.S.C. § 1001 *et seq.*:

Section 10 (60 Stat. 243):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * *

(b) **FORM AND VENUE OF ACTION.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF
AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA,
S. A.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL
MARITIME COMMISSION**

We address ourselves in this brief to three contentions urged by the respondent carrier (Flota) in its main brief. The first is jurisdictional. It is that even if, before the passage of the Hobbs Act, an order of the Maritime Commission granting reparations was judicially reviewable only in an enforcement action brought by the shipper, that Act gave the courts of appeals jurisdiction to set aside such orders at the suit of the carrier (brief of Flota, pp. 23-32). The second contention to which we reply is that,

whether or not the court of appeals was correct in setting aside the Commission's order here on the ground that it was inequitable to compel the carrier to pay reparations to the shipper, the court's decision rested on a "fair assessment" of the record, and, therefore, should not be disturbed by this Court (pp. 57-65). The third is that the Commission's order is invalid on additional grounds, not reached by the court of appeals—improper conduct by Commission personnel in connection with the administrative proceeding and application of an improper measure of damages (pp. 65-67).

1. We argue in our opening brief (pp. 14-36) that orders of the Maritime Commission granting reparations, like ICC reparations orders, have never been judicially reviewable by means of an action brought by the carrier to set aside the order (a direct review action) but only in an action by the shipper to enforce it (an enforcement action); that this reflects a fundamental distinction implicit in the agencies' organic Acts between reparations and other types of proceedings; and that the Hobbs Act, in transferring jurisdiction of actions to set aside Maritime Commission (but not ICC) orders from the district courts to the courts of appeals, did not make reparations orders subject to challenge in direct review actions. Conceding *arguendo* that the review situation was as we say prior to the Hobbs Act, Flota takes sharp exception to our argument that the Hobbs Act effected no change. Some amplification of our position on this point may be helpful.

Section 2 of the Hobbs Act conferred on the courts of appeals exclusive jurisdiction to set aside such final orders of the Maritime Commission "as are now subject to judicial review pursuant to the provisions of" Section 31 of the Shipping Act. Section 31 provides:

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Relying on the language of these sections and on the legislative history of the Hobbs Act, and conceding *arguendo*, as we have noted, that prior to the Hobbs Act the validity of an order granting reparations was judicially reviewable only in a shipper's enforcement action, Flota argues that the Hobbs Act enlarged the class of orders subject to challenge in direct review actions to include, for the first time, reparations orders.

(a) The first part of Flota's argument is textual. Flota reasons as follows: Section 31 speaks of actions to enforce, as well as actions to set aside, Commission orders; hence, to the extent that the carrier may, as we argue, obtain in the shipper's enforcement action judicial review of the validity of a reparations order, such judicial review is pursuant to Section 31; all orders judicially reviewable pursuant to that section may now, by force of the Hobbs Act, be challenged in the courts of appeals by way of direct review actions;

therefore, a reparations order, too, may be so challenged. This argument rests upon a misreading of Section 31.

That section has two quite different purposes. The first is to vest the courts with jurisdiction over actions to enjoin certain Maritime Commission orders. Nowhere else is such jurisdiction conferred; Section 31 is its only source. But Section 31 has an additional purpose: to prescribe the venue and procedure of all court actions arising from Commission orders, including actions to enforce such orders. The *jurisdiction* of the courts in enforcement actions, however, is created not by Section 31 but by Sections 29 and 30, the latter dealing with reparations orders. And insofar as a reparations order is judicially reviewable in an enforcement action, it is so by virtue of the language of Section 30 making the order and its underlying findings only *prima facie* evidence in the enforcement action, and not by virtue of anything in Section 31. Hence, the judicial review of a reparations order in an action to enforce the order is not pursuant to Section 31, but pursuant to Section 30.

(b) Flota's own analysis of the legislative history of the Hobbs Act reveals that the question whether reparations orders issued by the Maritime Commission would be reviewable under the Act in direct review proceedings was never adverted to in the course of the legislative deliberations; the focus was elsewhere. We have argued that prior to the Hobbs Act a reparations order could not be set aside at the suit of the party charged under Section 31 of the Shipping Act; for the purposes of its Hobbs Act

argument, Flota agrees. Accepting, then, that such orders could not be challenged in Section 31 direct review proceedings, we do not see how, in the absence of any legislative history on this point, Congress—merely by transferring jurisdiction of such proceedings to the courts of appeals—can be thought to have broadened Section 31. As we have seen, the language of the Hobbs Act certainly does not indicate that Congress meant to enlarge the class of orders which the courts were empowered to set aside under Section 31.¹ Congress, to repeat, conferred on the courts of appeals jurisdiction to set aside only those orders “now subject” to Section 31, and the court of appeals’ jurisdiction, accordingly, is no greater than that which the district courts enjoyed under that section.

2. The Commission’s determination that it was not inequitable to award Consolo reparations for the injury attributable to Flota’s violation of the Shipping Act must, of course, be upheld if supported by substantial evidence on the record as a whole. The court of appeals held that it was not supported by substantial evidence, and Flota correctly points out that the court of appeals’ decision on the substan-

¹ In describing the testimony of the Commission’s Chairman, Flota in its brief (p. 29) does not mention that he said: “This suggestion [for modification of the language of the bill] in no way advocates that the bill be so drafted as to confer rights to review in addition to those now authorized by law” (Hearings before Subcommittees of the House Judiciary Committee on H.R. 1468, 1470, and 2271, 80th Cong., 1st Sess., and 2915, 2916, 81st Cong., 1st Sess., p. 145). As we have pointed out, existing law (Section 31) did not permit review of reparations orders by means of actions to set them aside brought by the party charged.

tiality of the evidence should not be disturbed by this Court so long as the court of appeals made a "fair assessment" of the record (*Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502). In arguing that there was such an assessment by the court of appeals in this case, Flota relies heavily, and we think without justification, on the government's memorandum in response to Consolo's petition for certiorari.

In that memorandum we urged that the Court limit its grant of certiorari to the jurisdictional question. We said that while we believed that there was merit to Consolo's contention that the court of appeals had improperly substituted its judgment for the Commission's on the issue of equitableness (p. 11), "the reviewing court's redetermination of the equities did not involve [such] a flagrant disregard of the limitations of review" (p. 12) as to warrant further review. We also suggested that a central issue was whether the law was unsettled at the time of Flota's violation and that on this issue "the Commission's determination was entitled to less deference than on other matters." *Ibid.* The thrust of our argument, however, was not that the court of appeals had not committed reversible error but only that its error was not so grave as to justify this Court's exercising its discretionary jurisdiction to review the court of appeals' determination.

This Court disagreed, granting certiorari without limiting review to the jurisdictional question. The merits of the court of appeals' ruling on the equities issue are now before the Court; and we argue in our opening brief (pp. 44-52) that this ruling constituted reversible error. We there point out that the question

whether the law was in an unsettled state when Flota refused to grant Consolo refrigerated shipping space was not in fact crucial on the equities issue. For even if Flota was not certain that its refusal to serve Consolo was unlawful, it took, at the least, a calculated risk that it was; and, as between Flota and the innocent shipper harmed by its conduct, Consolo, the economic burden of the unlawful conduct should in fairness fall on the former—or so, at any rate, the Commission was entitled to conclude. In holding otherwise, the court below overstepped the proper bounds of judicial review of administrative orders. Accordingly, the court of appeals' decision should be reversed. Cf. *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592.

3. Flota argues that the Commission's order is invalid on two grounds in addition to that on which the court of appeals based its decision. These additional grounds were tendered to the court below; but the court, having decided that the Commission's order could not stand in any event because it was inequitable, found it unnecessary to, and did not, discuss or decide them. We submit that they are without merit.

(a) The first ground is that the administrative proceeding violated Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c), which requires the separation of the prosecutorial and adjudicative functions of the agency.² Flota complains of the partici-

² Section 5(c) provides in pertinent part that "[n]o officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the [agency's] decision."

pation of members of the Commission's staff in the drafting of the Commission's opinion because (1) they had participated as Public Counsel in the trial before the hearing examiner on the issue of whether Flota had violated the Shipping Act (though not in the trial on the reparations issue, held subsequently); and (2) had defended the Commission's first order, which the court of appeals set aside, in that court. The complete answer to both of these complaints is that Section 5(c) is by Section 5 of the Administrative Procedure Act expressly made inapplicable to "any matter subject to a subsequent trial of the law and the facts de novo in any court"; the legislative history makes clear that this language was specifically intended to exclude reparations proceedings from the requirement of separation of functions.³

³ The legislative history is summarized in the *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 43-44:

* * *

* * * This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: "Where the adjudication is subject to a judicial trial de novo [it] is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision." Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U.S.C. 16) and the Secretary of Agriculture (7 U.S.C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945 (p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:

"This exception also exempts administrative reparation orders assessing damages, such as are issued by the Inter-

We also note that the fact that the General Counsel's staff both defended the Commission's first order in the court of appeals and consulted in the preparation of the second order would not give rise to a violation of Section 5(c) even if reparations proceedings were not exempted; in merely defending the Commission's order in court, the staff was not engaged in the performance of an investigative or prosecuting function. See *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 58, n. 8.

(b) Flota also argues that the gist of its violation of the Shipping Act was discrimination between shippers, and that in such a case loss of profits is not a proper measure of damages. To our knowledge, this position has been uniformly rejected (see pp. 51-52, n. 38, of our opening brief); its practical effect, if accepted, would be to make a violation of the Shipping Act based on the complete exclusion of a shipper from common carrier service irremediable.

The record shows that there was no other carrier to which Consolo could practicably have turned to obtain the shipping space refused it by Flota (R. 22, 86-89, 258, 278, 312, 313, 563). Had Flota not refused to serve Consolo, but, rather, had charged Consolo a discriminatorily high rate, and had Consolo as a result been unable to sell bananas shipped via Flota, all would agree, surely, that Consolo could recover damages for his losses. But Consolo was un-

state Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement."

able to obtain from anyone the shipping space that he sought from Flota. Had he been able to obtain such shipping space, the record shows (R. 257, 270, 271, 277, 290-293, 445-449, 563, 564, 569-570), he could and would have bought additional bananas and sold them profitably in the domestic market. In these circumstances, the only possible measure of damages was his loss of profits. We emphasize that the record shows that had Flota granted Consolo the space which he sought and which, under the Shipping Act, he was entitled to, he would have been able to buy, ship and sell goods at a profit; and it also shows that the reparations awarded by the Commission in its second order represent a conservative estimate of these lost profits (see R. 513).

Interstate Commerce Commission v. United States, 289 U.S. 385, on which Flota relies, is not in point. That was a rate discrimination case. Both the higher and the lower rates were legal, and the carrier acted illegally only in that it charged different rates. The Court held that the disfavored shipper was not automatically entitled to recover, by way of damages, the difference between the two rates, but must prove damages. The Court pointed out (289 U.S. at 392) that the disfavored shipper had no right to be charged the lower rate—the higher rate was also legal. His only right was to be charged the same rate. Since the unlawful discrimination thus could be removed as effectively by raising the lower rate to the level of the higher rate as *vice versa*, the disfavored shipper was required to prove that the lower rate enabled the favored shipper to injure him competitively.

The present case is wholly different. Consolo was entitled to a *pro rata* share of Flota's refrigerated shipping space. Flota breached its duty as a common carrier in refusing him this space. Its refusal was unlawful in itself, just as if it had charged Consolo an illegal rate—in which event, the Court made clear in *Interstate Commerce Commission v. United States, supra*, the shipper could recover the full overcharge without proving competitive injury (289 U.S. at 390).

For the foregoing reasons, we urge that if this Court agrees with Flota that all issues pertaining to the validity of the Commission's order should be decided now, without a remand to the court of appeals for a decision on the issues it did not reach, the decision below should be reversed and the court of appeals directed to enter judgment affirming the order.

Respectfully submitted.

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NOVEMBER 1965.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

RESTATEMENT

We disagree with Flota's counterstatement of facts in many particulars, and point out our differences here, referenced to the number headings in Flota's brief.

1. *Flota's inability to obtain shippers.* Flota was "unable" to obtain banana shippers prior to 1955 be-

cause, prior to 1955, it did not have a regular service which banana shippers require (R. 21). It started a regular service in 1955, and its ships then became usable for the banana trade (R. 5-6; 21).

2. *The 1955 contract and option.* Panama Ecuador was not the only shipper interested in Flota's reefer space in 1955; Flota had rejected a bid made by Consolo in 1955 (R. 6). The 1955 exclusive contract was *not* in accordance with prevailing and long standing industry practice. The very case cited by Flota in support of its statement that it was (Fl. Br., p. 4), *Philip R. Consolo v. Grace Line*, 4 F.M.B. 293, was decided in 1953, and the Board there held that an exclusive contract by Flota's competitor Grace with a favored banana shipper violated sections 14(4) and 16 of the Shipping Act, 1916. 4 F.M.B. at 304.

3. *Exercise of the option.* The sequence of events is most important; it is correctly given in Consolo's opening brief (pp. 4-5) and the Government's opening brief (p. 4). In February, 1957, Flota told Consolo he could submit a bid for all Flota's refrigerated space (R. 204b-205). In March, 1957, Flota's Board of Directors voted to renew the Panama Ecuador contract, even though they had not yet received Consolo's bid (R. 432-33; 436-37). Thus Panama Ecuador could not have "perfected" any right to exercise its option, because it could not have met the terms of a bidder whose bid was not yet received. In April, 1957, the Board issued its decision in *Banana Distributors v. Grace Line*, 5 F.M.B. 278, and in May, 1957, Flota and Panama Ecuador entered into another three-year exclusive dealing contract (R. 187) although Flota admittedly knew about the *Grace Line* decision (R. 152).

In June, 1957, Flota informed Consolo that it had contracted all its space to Panama Ecuador (R. 207).

4. *Consolo's request of August 23, 1957.* Flota pretends Consolo demanded space on Flota after Consolo was thrown off the Grace Line because of the Board's *Grace Line* decision. This is not so. Consolo had been sharing space on the Grace Line with other banana shippers since the Board's first (1953) *Grace Line* decision (R. 89), and continued to share space with other banana shippers after the Board's second (1957) *Grace Line* decision (R. 89). Consolo was a shipper on the Grace Line all during the 1957-1959 period (R. 261). As a matter of fact, Panama Ecuador, Flota's favored shipper, obtained a fair share of Grace's space during the 1957-1959 period (as a result of the Board's 1957 *Grace Line* decision) while retaining *all* of Flota's space (R. 155). Consolo was not Grace's favored shipper and did not seek to become Flota's; Consolo wanted a fair share of space on both common carriers.

5. *Flota's dilemma.* The dilemma was self-made. Flota signed an exclusive dealing contract one month after its competitor had been told it must prorate its space fairly among all banana shippers. It signed the contract without seeking advice from the Board because in the words of its operating manager "[I]t is better to deal with one than with three" (R. 162).¹ In any event, Flota could have solved its "dilemma" in 1958, while the hearings were in process. In that year, Panama Ecuador threatened to cancel its contract un-

¹ Flota's general manager testified to the same effect:

"... the board of directors believed it very suitable, very convenient to extend the contract" (R. 434). See Government brief, pp. 46-47.

less Flota reduced its rates. Flota concurred in the reduction (R. 199-204; 499-500).²

6. *Flota's attempts to obtain a ruling from the Board.* Flota did not tender the Board a simple legal issue for resolution. Its petition asked for a "declaratory order" after a "full hearing" (R. 37) and at the hearing it contended that its vessels were so different from Grace's that carriage for more than one shipper was a physical impossibility (R. 134). Its briefs to the Examiner and exceptions to the Board argued the same point (R. 472-73; 638-39). Thus any Flota belief that it would obtain a ruling "within a month or two" (Fl. Br., p. 7) did not take into account Flota's own behavior.

7. *The Board's delay and ultimate action.* The Commission found as a matter of fact that Flota either authored or sponsored most of the delays (R. 509).³ Flota pretends it asked for delays in order to defend the reparation claim only, but, as the Board's decision stated (R. 279), *Flota introduced no proof whatsoever on the reparation calculation.* The "evidence" Flota tendered on reparation consisted chiefly of the testimony of two witnesses concerning the "availability" of chartered vessels (R. 344-57; 361-85). Thus Flota's argument that the case consumed two years because of the reparation claim is disproved on the record.

9.⁴ *The Board's reparations award.* The Board did state that Flota should have accepted the Board's 1957

² See Gov't. Br., p. 47.

³ The Government's opening brief, pp. 49-50, recounts Flota's various bids for delay, and the agency's prompt decisions.

⁴ Our numbering follows Flota's; we omit Flota's numbered paragraph which we do not comment upon.

Grace Line decision. Flota's own counsel had agreed. Flota did not defend on the ground that the *Grace Line* decision was wrong, and would be reversed. Rather, Flota's counsel said, in 1957, (R. 134):

"... are there sufficient facts brought before you to distinguish these cases from the *Grace Line* case which would say that the *Grace Line* case is good law but inapplicable because of the differences which we have set forth in this proceeding. *That is all we are seeking to learn from the Board.*" (Emphasis supplied).

There was thus no uncertainty as to the "law" in Flota's mind in 1957.

10. *The Petitions for Review in Nos. 16,366 and 16,369.* Consolo did *not* unequivocally urge the Court to take jurisdiction of Flota's petition. Consolo filed a motion (R. 621) to dismiss Flota's petition for lack of jurisdiction (R. 625-30). Consolo argued in the alternative that if the Court had jurisdiction, it must have jurisdiction to enforce the Commission's order, and thus Flota should be required to post a bond (R. 634-35).

11. *The Court of Appeals' first decision.* Mr. Robert E. Mitchell, the Commission's Assistant General Counsel, defended the Commission's order before the Court of Appeals. Mr. Mitchell personally never took any part in the case before the Board; he was Assistant General Counsel at the time Public Counsel intervened in support of Consolo's claim that Flota had to apportion its space fairly among all banana shippers (R. 483). The Office of Public Counsel did *not* intervene in the reparation hearings, did *not* file briefs nor take any position on the merits of the reparation claim

either before the Board or before the Commission on remand.

12. *The Commission's Report and Order on Remand.* Flota's statement (Fl. Br., p. 12) that the Commission's decision on remand found for the first time in six years of litigation that Flota was not acting in good faith is ingenuous. "Good faith" was never in issue before, because the Court of Appeals' decision introduced the novel concept of the "equity" of awarding damages where a violation of the Shipping Act was found and damages proved. The Court of Appeals directed the Commission to consider Flota's protestations of "good faith"; the Commission did so, and found they were unjustified on the record (R. 513).

The Commission's decision on remand reduced the award by accepting two Flota arguments on the reparation calculation; both arguments had been made to the Court of Appeals by Flota, and both arguments had been opposed in the Court of Appeals by Messrs. Pimper and Mitchell who defended the Commission's first decision on appeal (R. 492).

13. *The Petitions for Review in Nos. 18,230 and 18,235 and the Court's second decision.* Flota's petition (No. 18,230) was filed first (R. 670) and Consolo's petition (No. 18,235) was filed second (R. 676). Thus the Court could not have had "ancillary" jurisdiction to entertain Flota's petition.

ARGUMENT

I. THE COURTS OF APPEALS DO NOT HAVE JURISDICTION OF A CARRIER'S SUIT TO REVIEW A MARITIME COMMISSION REPARATION ORDER.

A. Flota's Misconstruction of the Review Provisions of the Shipping Act and the Hobbs Act.

The Hobbs Act (5 U.S.C. 1032) gives the Courts of Appeals exclusive jurisdiction of "such final orders of the United States Maritime Commission . . . as are now subject to judicial review pursuant to the provisions of Section 30 of Title 46 [Shipping Act, § 31] . . ." Section 31, in turn, provides that "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or part, any order of the Federal Maritime Board shall, *except as otherwise provided*, be the same as in similar suits in regard to orders of the Interstate Commerce Commission. . . ." (Emphasis supplied). There are two other sections which provide for enforcement of Maritime Commission orders: § 29 provides for enforcement of non-reparation orders, and § 30 provides for enforcement of reparation orders. *The critical difference between sections 29 and 30 is that there is no review of non-reparation orders under § 29 and there is a review of reparation orders under § 30.* Thus § 29 provides that the Commission, or a party in whose favor a non-reparation order was issued, may apply to a district court for enforcement of the order, and it "shall" be enforced by the district court if "the order was regularly made and duly issued." By contrast, § 30 provides that an entirely new suit be brought in district court on a reparation award, and the reparation order shall be only "prima facie evidence of the facts therein stated" in such suit.

Flota's conclusion that § 31 encompasses a carrier's suit to set aside a reparation order as well as a non-reparation order, rests on the premise that § 31 "did not . . . create a right of review; it was rather a provision for venue and procedure . . ." (Fl. Br., p. 24). But § 31 *did* create a right of review for non-reparation orders: otherwise, any non-reparation order would be enforced under § 29 only upon a showing that it was "regularly made and duly issued". Absent § 31, the losing party would have no right to defend a non-reparation order against enforcement on the grounds, for example, that the agency was applying a wrong rule of law, or that the agency decision was not based on substantial evidence. Absent § 31, the losing party must await an enforcement action in which all the winner need show is that the non-reparation order was in fact the order of the agency. By contrast, absent § 31, there is still a right of review of a reparation order—by defense to a shipper's suit under § 30 in which the award "cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either judge or jury."⁵ In short, if a carrier does not seek review of a cease and desist order, it has lost all right of review; if a carrier does not seek review of a reparation order, it has lost nothing.

Therefore, § 31 *does* create a right of review for non-reparation orders, and the exception in § 31—"except as otherwise provided"—must have reference only to § 30, which provides a right of review for reparation

⁵ Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 430, quoted in United States v. Interstate Commerce Commission, 337 U.S. 426, 435.

orders—in a new suit, in district court, and with the order *prima facie* evidence only.⁶

Flota's argument reduces to the proposition that a carrier had a right to review a reparation award in a three-judge court under § 31, and that the Hobbs Act transferred this right to a Court of Appeals. But Flota can point to *no* Shipping Act case, and to no Interstate Commerce Act case in the past 50 years, where such a review was granted.⁷ Our opening brief (pp. 18-19) showed that the uniform practice has been for carriers subject to either Act to await suit on the reparation order in district court. As the court stated in *United States v. Interstate Commerce Commission*, 198 F. 2d 958, 964, note 2 (C.A.D.C., 1952),⁸ cert. denied 344 U.S. 893 "no such [reparation] order has ever been the subject of direct judicial review."

Finally, Flota argues (Fl. Br., pp. 43-49) that a double review is preferable as a matter of policy, and is even an advantage to the shipper. How a shipper can be advantaged by a heads-you-lose, tails-you-don't-

⁶ The Flota argument concludes (Fl. Br., pp. 26, 33) that if § 31 excepts reparation orders under § 30, it must also except non-reparation orders under § 29, and thus be "read out of the statute." (Fl. Br., p. 33). But § 31 does *not* except non-reparation orders under § 29 for the reason given above—there is no real review provided for under § 29. Flota's own incorrect premise—that § 31 does not create a right of review—compels its incorrect conclusion—that § 31 applies equally to both §§ 30 or 29, or to neither.

⁷ The exception, of course, is *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 334 F. 2d 46 (C.A. 5, 1964), in which certiorari was granted last term. 379 U.S. 957.

⁸ This case was on appeal from the district court to which the cause had been remanded by this Court's decision in *United States v. Interstate Commerce Commission*, 337 U.S. 426.

lose-yet review, we fail to see. In any event, in weighing the policy considerations for reviewing reparation orders, this Court concluded in *United States v. Interstate Commerce Commission*, 337 U.S. 426, 443 that "one judge rather than three should entertain cases challenging Commission reparation orders. . . ."

B. The "Ancillary" Jurisdiction Argument

Both the Government and Flota argue that even if a Court of Appeals does not have jurisdiction to review an award of reparation on a carrier's petition, the court below had a kind of "ancillary" jurisdiction because Consolo petitioned the Court of Appeals to review the order insofar as it denied Consolo the full reparation claimed. Both arguments ignore important procedural facts in this case.

The Government contends that the court below had ancillary jurisdiction because Flota had a right to "intervene" in Consolo's suit and argue that the order was entirely invalid. But Flota did not confine its attack on the order to a defense of Consolo's suit. Flota filed its *own* petition to review, in which it asserted that the Court of Appeals had jurisdiction under the Hobbs Act (R. 670).

The Government notes in a footnote (Gov't. Br., p. 39, n. 30) that Flota filed its own petition, and then dismisses that petition as "not necessary to raise the defense of invalidity and confer jurisdiction on the court. . . ." Having dismissed it as not necessary, the Government discussion ignores the fact that it was

the basis for the Court's assumption of jurisdiction.⁹ Thus the factual situation which the Government argues would vest the court of appeals with ancillary jurisdiction is not presented in this case.

Flota bases its ancillary jurisdiction argument on the statement that "[o]nce the court's jurisdiction was invoked by Consolo and the record filed, the court below had jurisdiction to determine the validity of the orders in question. . . ." (Fl. Br., p. 51). The fact is, however, that on appeal from the Commission's second reparation award, Flota filed its petition first, invoking the jurisdiction of the court (R. 670), and Consolo filed his petition later (R. 676). The court's jurisdiction was invoked by Flota, not Consolo, and Flota's petition can therefore not be considered ancillary.

Although the ancillary jurisdiction arguments do not apply on the facts of this case, we do not contend that the ancillary jurisdictional question should be resolved depending upon whether the carrier attacks the order by intervention or separate suit, or depending upon whether the shipper or carrier files first. Rather, the policy considerations compelling one review in a district court are equally applicable whether the order is attacked because it granted too much or too little

⁹ Thus the Court began its discussion of jurisdiction by stating "Consolo has moved to dismiss Flota's petition in No. 16369 for lack of jurisdiction . . ." (R. 660). The Court then held it had jurisdiction. (R. 661-662). In discussing Consolo's petition in No. 16366 (R. 663-64) the Court sustained the Board's order denying the full amount of reparation claimed, but did not consider any Flota arguments attacking the validity of the order. The court did consider these arguments, but only when considering Flota's petition in No. 16369 (R. 664-67).

reparation.¹⁰ This Court so stated in *United States v. Interstate Commerce Commission*, 337 U.S. 426, 443:

“The same one-judge trial and appeal procedure available for enforcement of an award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations. For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal.”

D. L. Piazza v. West Coast Line, 210 F. 2d 947 (C.A. 2, 1954), cert. denied, 348 U.S. 839, held that the shipper *must* attack the adequacy of the award in the Court of Appeals, and thus Consolo was forced to bring his petition to the court below. *Piazza* appears irreconcilable with *United States v. Interstate Commerce Commission*. See petitioner's opening brief, pp. 23-24. If *Piazza* is right, however, the fact remains that the carrier can still present all its defenses in the suit in district court which must be brought to secure any reparation, whereas the shipper will never be able to attack the sufficiency of the award unless it

¹⁰ The Government argues (Gov't. Br., pp. 39-43) that once the shipper's suit is filed, considerations of “economy” support the court's jurisdiction of the carrier's appeal. These “considerations”, however, stop short of enforcement of the award: even if the court has complete jurisdiction, the shipper cannot win without bringing another, new suit in District Court. Thus the only real economy that can be achieved is by one suit in district court, in which the carrier can present all his defenses to the order.

brings a review petition in the court of appeals. If the court of appeals has "ancillary" jurisdiction to void the reparation order when considering the shipper's petition to obtain more reparation, then it should have "ancillary" jurisdiction to enforce the reparation order if it sustains the order against the carrier's attack. But the court below neither held, nor does the government here contend, that ancillary jurisdiction vests the court with power to enforce a valid order. Thus ancillary jurisdiction is still a one-way street: it does not enable the court of appeals to dispose of the controversy in one lawsuit.

II. THE COURT BELOW INTRODUCED A NEW STANDARD OF "EQUITY" IN REPARATION AWARDS AND MADE ITS OWN FINDINGS OF FACT ON THE EQUITIES.

A. The New "Equity" Doctrine

The Government takes the position that it is not necessary to decide in this case whether the Commission has power to deny reparation on "equitable" grounds, because the Commission's finding that an award of reparation was equitable was clearly supported by substantial evidence (Gov't. Br., pp. 43-44). Flota contends that the "equity" standard announced by the Court of Appeals was correct.

Flota argues, first, that the Board's 1959 decision, while holding that Flota had violated the Act, did not foreclose the Board from later considering whether Flota's conduct was unjust and unreasonable (Fl. Br., pp. 54-55). Flota says that the court of appeals "employed the word 'inequitable' in the same sense as the statute employs the words 'unfairly,' 'unjustly' or 'unreasonably.'" (Fl. Br., p. 56). The simple answer to this argument is that the Commission found,

and the court below sustained the finding, that Flota had violated the statute precisely because its *past* conduct had been unreasonable and unjust (R. 658-59).¹¹ Thus, the court below held, on appeal from the Board's decision on the merits, that the Board "was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just." (R. 659)¹² Clearly, then, Flota was adjudged guilty of violating sections 14 and 16 of the Shipping Act, 1916, in the *past*, and these sections can only be violated by "unjust" and "unreasonable" past conduct.¹³ The standard of "equity" is in addition to the statutory standards of justness and reasonableness, and it is a new, undefined standard.

Flota argues, second, that reparation can be "equitably" denied if an agency is retroactively applying a new rule of law. The short answer to this is that the Board had previously announced the same rule of law in two previous cases involving the same trade and the same commodity. *Philip R. Consolo v. Grace Line*, 4 F.M.B. 293 (1953); *Banana Distributors Inc., v. Grace Line*, 5 F.M.B. 278 (1957). The rule that a common carrier is liable for an unjustified refusal to carry is

¹¹ Flota did not appeal from that part of the Commission's 1959 decision which required it to open its space to all shippers; Flota appealed only from the Board's decision insofar as it held that Flota had violated the Shipping Act, 1916 (Fl. Br., p. 9, ¶8).

¹² Two years later, the same court held that the exclusive contract and the petition for declaratory order rendered Flota's discriminatory refusal of space "equitable."!

¹³ The rate cases cited by Flota (Fl. Br., pp. 55-56) which distinguished between rates held illegal for the future but not for the past, are inapposite. Here there was a finding that *past* conduct was unjust, unreasonable, and hence illegal.

at least as old as the law of common carriage. *The Wildenfels*, 171 Fed. 864 (C.C.A. 2d, 1908).

B. Standards of Judicial Review

In our opening brief, we showed that the court of appeals, instead of considering whether there was substantial evidence to support the Commission's findings, determined on the basis of its own findings that there was more—or substantial—evidence to support Flota's position. Flota protests that the court "recognized . . . that the question was not merely the substantiality of evidence supporting Flota's contention," but Flota cites nothing in the decision which betrays such a recognition (Fl. Br., p. 60). The language of the decision below shows unequivocally that the court was weighing the evidence itself.¹⁴

The Government brief sets forth the evidence in the record which supports the Commission's finding on each issue of fact (Gov't. Br., pp. 43-45). Flota responds (Fl. Br., pp. 61-62) that the appellate court's review of the agency's findings should not be considered by this Court. That argument has been disposed of by the grant of certiorari on all issues, including whether "the Court of Appeals appl[ie]d a proper standard for review in setting aside the order by making its own contrary findings of fact?"¹⁵

Flota also says that the Court of Appeals' findings of fact were correct (Fl. Br., pp. 62-64). The point

¹⁴ For example, the Court below said: ". . . the Commission's determination ignores . . . the substantial *weight* of the evidence. . . . (R. 689; emphasis supplied). And again: "In view of the substantial evidence showing that it would be inequitable to assess damages against Flota. . . ." (R. 698).

¹⁵ Petition for Writ of Certiorari, p. 3.

remains, however, that under established principles of agency-court review, the proper inquiry is not whether other findings could have been made, but whether the agency's findings were supported by substantial evidence. The evidence, as set forth in the Government's brief, proves that they were. Accordingly, the Commission's decision should have been sustained.

Last week this Court, reversing a Court of Appeals decision which had in turn reversed a Federal Trade Commission order, restated the correct standard for review:

"There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong. The Court of Appeals should have sustained it." *Federal Trade Commission v. Mary Carter Paint Co.*, 34 L.W. 4005, October Term, 1965, No. 15.

This is the long-established rule: the agency's decision must be sustained if there is substantial evidence to support the agency's findings. The agency's decision should not be reversed because the court of appeals preferred to believe the offender's explanations.

III. THE ADDITIONAL ISSUES RAISED BY FLOTA DO NOT SUPPORT THE DECISION BELOW.

A. The Commingling of Functions Argument

Flota's argument (Fl. Br., pp. 65-66) respecting an "improper commingling" of functions omits several critical facts.

1. Mr. Mitchell was Assistant General Counsel at the time the 1958 hearings on the merits were held, and as such his name was on Public Counsel's brief

(R. 483). Mr. Mitchell did not participate in the hearings (R. 71-169; 283-325; 557-606). Mr. Pimper was unconnected in any way with Public Counsel's participation on the merits. (R. 483; 71-169; 283-325; 557-606).

2. Neither Mr. Pimper, Mr. Mitchell, nor any other Commission employee intervened in the 1960 reparation hearings (R. 326-441; 607-616); nor did Mr. Mitchell, Mr. Pimper or any other Commission employee file briefs on or orally argue the reparation claim to the Commission either before the Commission's first reparation decision (R. 269-72) or after remand (R. 501; 618).

3. Mr. Pimper and Mr. Mitchell defended the Commission's orders on the merits and reparation against the attacks of *both* Flota and Consolo (R. 651; 686).

4. The Minutes of a Commission meeting of October 29, 1962, (held after the Commission had heard oral argument pursuant to the remand) show that the Commission's General Counsel, Mr. Pimper, was present, and the Commission directed its General Counsel to prepare a "proposed report and order in accordance with the instructions given at this meeting." (R. 526).

5. The next Minutes show that at a meeting of the Commission on September 16, 1963, at which Mr. Pimper and Mr. Mitchell were present, "The Commission considered draft of proposed Report and Order . . . which had been prepared pursuant to instructions given by the Commission . . . copies of which had previously been distributed to the Commissioners. After discussion, . . . the Commission adopted the Report and Order." (R. 527)

6. The new report and order reduced the award by accepting two Flota arguments on the reparation calculation; both arguments had been made to the Court of Appeals by Flota, and both arguments had been opposed in the Court of Appeals by Mr. Pimper and Mr. Mitchell.

We submit that these facts show no improper "comingling"; that neither Mr. Pimper nor Mr. Mitchell participated in the reparation claim other than as Commission attorneys defending the Commission decision in Court and preparing a second Commission decision in accordance with Commission instructions. The Commission's attorneys could be no more wedded to the first Commission decision nor biased against Flota than the Commissioners themselves.

Moreover, even if Messrs. Pimper and Mitchell had participated in the reparation case before the Board—which they did not—there would be no constitutional or statutory infirmities in their participation in the Board's deliberations:

"We hold that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, . . . the Commission's own rules, as well as constitutional due process." *Wilson and Co. v. United States*, 335 F. 2d 788, 796 (C.A. 7, 1964), cert. denied, 380 U.S. 951.

B. The Measure of Damages Argument

Flota argues that the Commission's measure of damages—difference between market price at destination and market price at origin, less cost of transportation—was wrong. Flota says that the measure of damage should be how much "worse off" Consolo was because Panama Ecuador used Flota's space. This measure is lifted from the line of cases beginning with *Interstate Commerce Commission v. United States*, 289 U.S. 385, which held that where two shippers are charged different rates, and neither is the legal rate, the measure of damage is how much worse off one shipper is because his competitor paid less.¹⁶ If the rate discrimination measure were applied to space discrimination, then the shipper's damages would decrease in proportion to the extent of the discrimination. At the point where the discrimination was total, as here, the damages would be zero, because the excluded shipper never had an opportunity to compete with the favored shipper. Under Flota's measure of damages, a total exclusion is a total excuse.

The Flota measure was not accepted by the Commission,¹⁷ and has never been used by the courts. All refusal to carry or space discrimination cases have measured the shipper's damages by the amount he

¹⁶ Of course, if a rate is illegal in and of itself, the measure of damage is the difference between the rate charged and a lawful rate. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531.

¹⁷ The Commission was directed, under § 22 of the Shipping Act, to award "full reparation to the complainant for the injury caused by such violation." The violation here was exclusion, and the injury was loss of profits on cargo excluded.

would have earned if his goods had been carried, or, if space was insufficient to carry all his goods, by the amount he would have earned if he had been given his fair share of space. *The Wildenfels*, 161 Fed. 864 (C.C.A. 2d, 1908), cert. denied, 215 U.S. 597; *Swayne & Hoyt v. Everett*, 255 Fed. 71 (C.C.A. 9th, 1919); *Pennsylvania R. Co. v. Weber*, 257 U.S. 85; *Baltimore & O. R. Co. v. Brady*, 288 U.S. 448; *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936); *Hernandez v. Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941). The Court of Appeals' statement in its first opinion that the Board's measure of damages was "harsh" (R. 667); and its statement in its second opinion that Consolo suffered "only the loss of speculative profits" (R. 690) show that, as the court below itself stated, it thought the reparation remedy inappropriate and of declining importance (R. 690).¹⁸ If this Court considers Flota's arguments about the measure of damages, it should affirm the measure used by the Commission.

¹⁸ The Government's brief, pp. 51-52, n. 38, shows that the measure of damages questioned by the court below is the usual, appropriate measure for refusal to carry cases.

CONCLUSION

The decision below should be reversed on each of the three grounds urged by petitioner, and the case remanded to the Court of Appeals for the District of Columbia Circuit with instructions to dismiss Flota's petition for review.

Respectfully submitted,

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November, 1965

SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1965.

Philip R. Consolo, Petitioner,	} On Writ of Certiorari	
<i>v.</i>		to the United States
Federal Maritime Commission		Court of Appeals for
et al.		the District of Co-
		lumbia Circuit.

[March 22, 1966.]

MR. JUSTICE WHITE delivered the opinion of the Court.

We have been asked, in this case, to determine whether the Court of Appeals had jurisdiction to set aside a reparation order of the Federal Maritime Commission which was before it upon the consolidated appeals of the shipper and the carrier, the shipper asking that the award be increased and the carrier asking that it be set aside. In addition, we have been asked to determine whether the Court of Appeals applied the proper standard of review when it set aside the reparation award. We answer the first question in the affirmative and the second in the negative. Accordingly, we reverse.

Flota Mercante Grancolombiana, S. A. (Flota) is a common carrier engaged in carrying bananas from South America to the United States. In July 1955, it entered into an exclusive two-year carrying contract with Panama Ecuador, a banana shipper, and gave Panama Ecuador an option to renew the contract for an additional three years, subject to its meeting the rate offered by any other shipper. This exclusive contract was executed after the Federal Maritime Board, in June 1963, had ruled that Flota's competitor, Grace Lines, was a common carrier of bananas and had violated the Ship-

ping Act, §§ 14 (Fourth)¹ and 16 (First),² by refusing to allocate its banana shipping space equitably among all qualified shippers.³ In April 1957, the Board reiterated its view that Grace Lines had violated the Shipping Act by signing exclusive carrying contracts and it ordered Grace Line to offer to all qualified shippers, upon a fair basis, shipping space on forward-booking contracts not to exceed two-years in length.⁴ One month after this ruling Flota rejected a bid by Consolo, a banana shipper competing with Panama Ecuador, for the entire shipping space and honored the option given Panama Ecuador by

¹ "§ 14 (Fourth). [No common carrier by water shall] Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims." 46 U. S. C. § 812 (1964 ed.).

² "§ 16 (First). [It shall be unlawful for any common carrier by water] To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" 46 U. S. C. § 815 (1964 ed.).

³ *Philip R. Consolo v. Grace Line, Inc.*, 4 F. M. B. 293 (1953). No order was issued pursuant to this report.

⁴ *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F. M. B. 278 (1957). This decision predicated liability upon the theory that bananas were "susceptible to common carriage" and could be carried by a carrier only under terms of common carriage. This decision was reversed and remanded by the Second Circuit, 263 F. 2d 709. On remand the Board dropped its "susceptibility" theory but nevertheless found Grace Line to be a common carrier under the Shipping Act and held it could not evade the requirements of the Act as to any part of the goods it carried. 5 F. M. B. 615 (1959). This was affirmed by the Second Circuit upon appeal. 280 F. 2d 790, cert. denied, 364 U. S. 933.

executing to it a three-year exclusive carrying contract. Shortly thereafter Consolo demanded a "fair and reasonable" amount of the carrying space pursuant to the previous Grace Line decisions of the Board and threatened to bring suit if its demand were rejected. Flota rejected the demand and itself brought suit before the Board for declaratory relief⁵ exonerating it from liability to Consolo. Consolo followed with a suit before the Board asking for damages. These suits were consolidated and, in June 1959, the Board ruled that Flota's three-year exclusive contract with Panama Ecuador violated the Shipping Act, §§ 14 (Fourth) and 16 (First), and it ordered Flota to allocate its space fairly among all qualified banana shippers.⁵ Pursuant to § 2 (c) of the Administrative Orders Review Act (5 U. S. C. § 1032 (c) (1964 ed.)), Flota petitioned the Court of Appeals for the District of Columbia to set aside this order. This appeal was stayed, pending determination of the reparations proceeding. In March 1961, the Board ordered Flota to pay Consolo certain reparations for the violation of the Shipping Act.⁶ Both Flota and Consolo appealed from this reparation order and both intervened in the appeal of the other, Consolo asking that the reparation award be increased and Flota asking that it be set aside. These appeals were consolidated together with Flota's appeal to set aside the Board's finding of a violation of the Shipping Act.

The Court of Appeals held that it had jurisdiction to consider these appeals. It affirmed the Board's finding that Flota had violated the Shipping Act but remanded to the Board the issue of reparations so that it could "consider whether, under all the circumstances, it is

⁵ 5 F. M. B. 633, 641. This order was issued on July 2, 1959. Flota complied by September 1, 1959.

⁶ 6 F. M. B. 262.

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inequitable to force Flota to pay reparations”⁷ On remand the Federal Maritime Commission⁸ concluded that it was not inequitable to require Flota to pay Consolo reparations, although it did reduce the amount of the award.⁹ Again, both Flota and Consolo appealed to the Court of Appeals for the District of Columbia, both intervened in the appeal of the other, and the two appeals were consolidated.¹⁰ Again Consolo maintained that the award was too small and Flota argued that it should be set aside in part or in whole. The Court of Appeals reversed and vacated the reparation award, concluding that “in view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, . . . the Commission abused the discretion granted it under Section 22 of the Shipping Act¹¹ [to issue reparation awards]” 342 F. 2d 924, 931. Consolo petitioned this Court for a writ of certiorari to review that decision, which we granted. 381 U. S. 933.

⁷ 302 F. 2d 887, 896.

⁸ The functions and duties of the Federal Maritime Board, so far as relevant to this case, were transferred to the Federal Maritime Commission on August 12, 1961. Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U. S. C. § 1111, note (1964 ed.).

⁹ 7 F. M. C. 635.

¹⁰ None of the parties challenged, at this time, the jurisdiction of the Court of Appeals to hear these consolidated appeals.

¹¹ “Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. . . . If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.” 46 U. S. C. § 821 (1964 ed.).

I.

The first question we have is whether the Court of Appeals had jurisdiction of the appeals filed by Consolo and Flota.¹²

As we read the controlling statutory provisions, it seems clear that the Court of Appeals had jurisdiction to consider Consolo's direct appeal from the Commission's reparations order granting only part of the relief requested. Section 2 of the Administrative Orders Review Act (5 U. S. C. § 1032 (1964 ed.)) gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . (c) such final orders of the . . . Federal Maritime Board . . . as are now subject to judicial review pursuant to the provisions of section 830 of Title 46" Section 830 of Title 46 (§ 31 of the Shipping Act, 1916), in turn, says that, "except as otherwise provided," orders of the Federal Maritime Board are reviewable pursuant to the same procedures as are available "in similar suits in regard to orders of the Interstate Commerce Commission" Accordingly, if pursuant to provisions in the Interstate Commerce Act a shipper can bring a direct review proceeding to challenge the inadequacy of a reparations award issued by the Interstate Commerce Commission, he should be permitted to bring a similar suit to challenge the inadequacy of a reparations award from

¹² Much of what we said in *Interstate Commerce Comm'n v. Atlantic Coast Line R. Co.*, ante, is relevant to the jurisdictional issue presented by this case. The Senate Report explaining the Shipping Act expressly observed that the enforcement provisions of the Shipping Act were "modeled very closely after the interstate commerce act" S. Rep. No. 689, 64th Cong., 1st Sess., p. 13. That report also counsels that "the administrative and enforcement provisions of the [interstate commerce] act and the nearly 30 years' experience of the Interstate Commerce Commission [may] be adopted with slight modification to the purposes of [the Shipping Act]." S. Rep. No. 689, 64th Cong., 1st Sess., p. 12.

the Federal Maritime Commission, subject of course to any special provisions applicable to maritime cases such as the provision in § 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts.

The Court has previously held that an order of the Interstate Commerce Commission denying a shipper's reparations claim is subject to direct review at the instance of the shipper, *United States v. Interstate Commerce Comm'n*, 337 U. S. 426, primarily because the adverse order would be wholly unreviewable unless the shipper is permitted to bring an appeal. See *Rochester Telephone Corp. v. United States*, 307 U. S. 125. Likewise, in *D. L. Piazza Co. v. West Coast Line, Inc.*, 210 F. 2d 947, cert. denied, 348 U. S. 839, the Court of Appeals for the Second Circuit was of the opinion that the principles of *United States v. Interstate Commerce Comm'n* were authority for allowing the shipper to seek direct review of an order of the Federal Maritime Board denying a major part, but not all, of the shipper's reparations claim. We think *Piazza* was correct in this respect and we accordingly agree with the court below that it would have jurisdiction to consider Consolo's appeal.

As for Flota's appeal, much of what we have said in *Interstate Commerce Comm'n v. Atlantic Coast Line*, decided today, is pertinent to our consideration here. In that case, where direct review had not been sought by the shipper, we held that the carrier may have review of a reparations order of the Interstate Commerce Commission only in connection with the shipper's enforcement action under § 16 (2) of the Interstate Commerce Act. Section 30 of the Shipping Act provides for a similar action by the shipper to enforce a reparations award by the Maritime Commission and extends certain procedural advantages to the shipper generally comparable

to those provided by § 16 (2) of the Interstate Commerce Act. He has a wide scope of venue; he is not liable for costs unless they accrue on his own appeal; he is allowed reasonable attorney fees if he ultimately prevails; he is the beneficiary of broad service of process and joinder provisions; and the findings and order of the Commission are given prima facie effect in the enforcement action. These advantages were given to the shipper because he was considered generally to be the weaker party in the controversy and he serves an important role in the enforcement of the Shipping Act. It was to protect advantages similar to these by preventing the carrier from emasculating the enforcement action that we concluded in *Interstate Commerce Comm'n v. Atlantic Coast Line* that the carrier could not seek review of the reparations award except in connection with a shipper's enforcement action. It is readily apparent, we think, that this holding is applicable to Shipping Act cases when the shipper himself has not sought direct review in the Court of Appeals.

Here, however, the jurisdiction of the Court of Appeals has been invoked by the shipper, who seeks to increase the amount of his damages. In these circumstances, we find nothing in the Shipping Act or the Administrative Orders Review Act that would prevent the Court of Appeals from also considering Flota's request, either as a consolidated appeal pursuant to § 2 of the Administrative Orders Review Act or as an intervenor's cross-claim, to have the reparations order set aside or reduced, a result which will not, in our view, substantially impair the procedural advantages intended for a shipper under § 30.

Concerning venue, the shipper will still be able to select the forum. Although the venue provisions governing an appeal are somewhat different from those governing an enforcement suit, the shipper still has rela-

tively wide opportunities to find a convenient forum. Section 3 of the Administrative Orders Review Act (5 U. S. C. § 1033 (1964 ed.)) enables the petitioner to bring suit in the judicial circuit where he resides, where his principal office is located or for the District of Columbia. By requiring that the carrier's review proceeding be brought in the court selected by the shipper for his appeal, all the issues in the controversy will be tried in a relatively convenient forum for the shipper.

The shipper will not have the benefit in a direct review of those provisions in § 30 that exempt him from his costs and enable him to collect his attorney's fees if he ultimately prevails.¹³ However, the only additional costs and attorney's fees that the shipper will incur if the carrier is permitted to challenge the reparations award upon a consolidated appeal or cross-claim are those costs and fees attributable to additional issues not otherwise raised by the shipper's appeal. To the extent the arguments a carrier may advance to decrease or set aside an award would be asserted in any event as defenses to the shipper's claim for increased reparations, no additional costs or fees will be incurred beyond those which the shipper would normally assume for his appeal. And, if the shipper prevails against the carrier's appeal, any additional costs, although not attorney's fees, as are incurred may be assessed against the carrier as the losing party under 28 U. S. C. § 1912 (1964 ed.). See also District of Columbia Cir. R. 20 (b).

The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparations

¹³ Unlike the Interstate Commerce Commission situation, there is no possibility here that an enforcement action can be joined with a direct review proceeding (thereby raising the possibility that the favorable provisions of the enforcement section may become applicable and ensuring that the Commission will be a party), because enforcement suits must be in the district courts and direct reviews can be taken only to the courts of appeals.

order are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order. Many of the arguments a carrier might make in defense against a shipper's suit to increase the award could also be advanced to show that the award should be reduced or set aside entirely. And, once the carrier intervenes in the shipper's appeal, all the parties interested in the complete resolution of the validity of the Commission's order are before the court. In this situation it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action.¹⁴

With the jurisdiction of the Court of Appeals properly invoked by the shipper, there is, therefore, every reason to permit the carrier not only to litigate the amount of the reparations order but also to insist upon a determination of the validity of the Commission's order, both with respect to the carrier's violation of the Act¹⁵ and with respect to the reparations award itself. If the carrier finally prevails on either of these claims, there would then be no occasion for a separate enforcement suit in the District Court. If the carrier's claims going to the validity of the order are rejected by the Court of Appeals, the determination of a violation by the carrier would be binding in the subsequent enforcement action by the shipper;

¹⁴ These same considerations of judicial economy and fairness to all the parties lie behind the doctrine of ancillary jurisdiction, *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Silver v. Louisville & Nashville R. Co.*, 213 U. S. 175; 2 Moore, Federal Practice, ¶ 8.07 [5] (2d ed. 1965), and the doctrine that an intervenor of right may assert a cross-claim without independent jurisdictional grounds, 4 Moore, Federal Practice, ¶ 24.17 (2d ed. 1963).

¹⁵ Of course, in this case the issue of Flota's violation of the Act was resolved in a previous direct appeal by Flota from the Board's cease-and-desist order. There is no question of the jurisdiction of the Court of Appeals to consider that appeal.

nor would there be any basis in the course of a subsequent enforcement action conducted in accordance with § 30 to redetermine whether or not the award itself is supported by substantial evidence in the administrative record.¹⁶ Hence, the shipper will need to litigate the issue of validity only once, and this in the Court of Appeals at the instance of the carrier. Although two proceedings may be required to collect his damages, this is only a necessary incident of the shipper's decision to bring his appeal in the first place.

In short, although a shipper may lose some of the procedural advantages given him by § 30 if he is forced to defend the validity of the Commission's order in conjunction with his appeal, these losses generally will not be substantial. To the extent that he is disadvantaged, this is the result of a conscious choice he has made. And from the point of view of the enforcement of the Shipping Act, it is certainly less important that the shipper be assisted in his efforts to obtain a greater award than it is to assist him in his efforts to enforce an existing award. The Court of Appeals was correct in sustaining its own jurisdiction to hear Flota's appeal.

II.

We turn, then, to the standard of review used by the Court of Appeals when it reversed the Commission's reparation order.

The Court of Appeals rejected the Commission's finding that it would not be inequitable to award Consolo reparations because it felt this finding "ignores . . . the substantial weight of the evidence" 342 F. 2d 924, 926. It then concluded that the Commission abused its discretion in ordering reparations because "of the sub-

¹⁶ See our discussion of the defenses available to a carrier in an enforcement action at *Interstate Commerce Comm'n v. Atlantic Coast Line R. Co.*, ante, at p. —, n. 6.

stantial evidence showing that [the reparations] would be inequitable." *Id.*, at 931. In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if "substantial evidence" or "the substantial evidence" supports a conclusion contrary to that reached by the Commission, then the Commission must be reversed.¹⁷ This standard is not consistent with that provided by the Administrative Procedure Act.

Section 10 (e) of the Administrative Procedure Act (5 U. S. C. § 1009 (e) (1964 ed.)) gives a reviewing court authority to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence" Cf. *United States v. Interstate*

¹⁷ In its first opinion, remanding the issue of reparations to the Commission, the Court of Appeals said, "But in reviewing the evidence [as opposed to reviewing issues of law], we are confined to a much more restricted standard, as the Administrative Procedure Act, §§ 1 et seq., 5 U. S. C. A. § 1001 et seq., and a long line of Supreme Court decisions, clearly indicate. See, e. g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, 95 L. ed. 456 (1951); *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489, 62 S. Ct. 722, 86 L. ed. 971 (1942). We have examined the appeal from the reparations award with these considerations in mind." 302 F. 2d 887, 895. However, in its second opinion, when it reviewed the Commission's finding that it would not be inequitable to award reparations, the Court of Appeals made no reference to the Administrative Procedure Act. The standard of review articulated and apparently applied in that opinion was inconsistent with the Administrative Procedure Act.

We do not read the opinion below as asserting that the Court of Appeals, in a direct review proceeding, may conduct a *de novo* review of the equities of a reparation award. We find nothing in the Shipping Act, the Hobbs Act, or the Administrative Procedure Act that would authorize a *de novo* review in these circumstances, and in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed. 4 Davis, *Administrative Law Treatise*, § 29.08 (1958). See *United States v. Carlo Bianchi & Co., Inc.*, 373 U. S. 709, 715; *Morrison-Knudsen Co. v. O'Leary*, 288 F. 2d 542, 543-544.

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Commerce Comm'n, 198 F. 2d 958, 963-964, cert. denied, 344 U. S. 893. We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 229. "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300.¹⁸ This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106; *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F. 2d 18, 21.

Congress was very deliberate in adopting this standard of review.¹⁹ It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.²⁰ These policies are particularly

¹⁸ Although these two cases were decided before the enactment of the Administrative Procedure Act, they are considered authoritative in defining the words "substantial evidence" as used in the Act. 4 Davis, *Administrative Law Treatise*, § 29.02.

¹⁹ The test of substantial evidence in the record considered as a whole had been applied by some reviewing courts even before Congress acted. See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 483, 490.

²⁰ See *Federal Trade Comm'n v. Mary Carter Paint Co.*, — U. S. —; *Labor Board v. Southland Mfg. Co.*, 201 F. 2d 244, 246. These same policies are behind the "primary jurisdiction doctrine." *Far East Conference v. United States*, 342 U. S. 570, 574-575; *United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd.*, 284 U. S. 474. See generally, Stason, "Substantial Evidence" in *Administrative Law*, 89 U. Pa. L. Rev. 1026 (1941).

important when a court is asked to review an agency's fashioning of discretionary relief.²¹ In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below.

Ordinarily we would be inclined to remand to the Court of Appeals for further consideration in light of the standard of review established by the Administrative Review Act. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474; *Labor Board v. Walton Mfg. Co.*, 369 U. S. 404. However, in view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now. See *O'Leary v. Brown-Maxon, Inc.*, 340 U. S. 504.

Section 22 of the Shipping Act, 1916, provides that "The Board *may* direct the payment . . . of full reparation to the complainant for the injury caused by such violation." 46 U. S. C. § 821 (1964 ed.). (Emphasis added.) This contemplates that the Commission shall have a certain amount of discretion,²² but it does not

²¹ See *Labor Board v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344; *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U. S. 194, 207-209; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177. See also *Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 217, where considerable deference was given the Federal Security Administrator in the promulgation of rules pursuant to the Federal Food, Drug, and Cosmetic Act.

²² See *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F. M. C. 432. See also *Johnson Seed Co. v. United States*, 90 F. Supp. 358,

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specify what factors are to be considered by the Commission in exercising this discretion. However, we assume that the Commission could validly consider such factors as whether a reparation award would enhance the enforcement of the Act, whether the shipper had suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of culpability of the carrier.²³ Hence, even if the carrier's conduct were such that it would be inequitable to require it to pay a reparation award, this by itself might not be sufficient to establish that the Commission abused its discretion under the Act. However, we need not rest upon this distinction because we feel that it is clear that there is substantial evidence in the record, considered as a whole, to support the Commission's findings that it would not be inequitable in this case to require Flota to pay Consolo reparations.

The Maritime Board determined, and the Court of Appeals agreed, that Flota had been guilty of "unfairly" or "unjustly" discriminating against Consolo and of giving an "undue unreasonable preference" to Panama Ecuador in violation of § 14 (Fourth) and § 16 (First)

aff'd 191 F. 2d 228; *Boston Wool Trade Assn. v. Director General*, 69 I. C. C. 282, 309, where, to avoid an award of reparations that would be inequitable, the I. C. C. and the courts found certain practices by the carriers to be unreasonable only prospectively. See also *Delaware, Lackawanna & Western Coal Co. v. Delaware, Lackawanna & W. R. Co.*, 46 I. C. C. 506, 509.

²³ The Senate Report says that the enforcement provisions in the Shipping Act "confer upon the board power to make orders necessary for the enforcement of the act . . ." S. Rep. No. 689, 64th Cong., 1st Sess., p. 13. (Emphasis added.) Later on, the report says the board shall "make such order as may be proper, including an award of reparations for an injury resulting from the violation." *Ibid.*

of the Shipping Act.²⁴ These findings, which were essential to the determination that Flota had violated the Shipping Act, substantially undercut any equities that Flota might claim. Nevertheless, the Court of Appeals considered it inequitable to make Flota pay reparations because Flota might have believed, in view of the unsettled law, that it was not illegal to exclude Consolo.

Prior to Flota's rejection of Consolo's request for a fair portion of the shipping space, the Federal Maritime Board has decided only two cases relevant to this issue: *Consolo v. Grace Line*, *supra*, and *Banana Distributors, Inc. v. Grace Line*, *supra*. Both cases held invalid exclusive dealing contracts similar to the one in question here. The Court of Appeals would minimize these two cases as precedent because no order was issued in the first *Grace Line* decision and the second *Grace Line* decision was ultimately reversed and remanded by the Second Circuit Court of Appeals. Nevertheless, at the time Flota entered into the 1957 exclusive contract with Panama Ecuador and at the time it rejected Consolo's request for a fair share of the shipping space, these decisions were authoritative pronouncements by the agency primarily responsible for administering and interpreting the Shipping Act. And, although the second *Grace Line* decision was ultimately reversed and remanded, upon reconsideration the Board still found the exclusive contract there in question to be illegal and that

²⁴ The Court of Appeals said it is "beyond question" that the Board considered and made sufficient findings, supported by the record, that Flota's exclusive contract with Panama Ecuador was "unjust" and "unreasonable." It also said that the Board was "entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just." 302 F. 2d 887, 892-893.

decision was ultimately affirmed upon appeal to the Second Circuit.²⁵

As further evidence of good faith, the Court of Appeals was of the opinion that Flota could reasonably have believed its situation was different from that presented to the Board in the *Grace Line* cases because of physical differences between its vessels and those owned by Grace Line. However, in its first decision affirming the Board's finding of a violation the Court of Appeals had affirmed that the record "adequately supported" the Board's finding that "the differences between Flota's vessels and Grace's vessels are not impressive." 302 F. 2d 887, 892. We think the Court's first judgment was the correct one. The record is adequate to establish that Flota took a deliberate, and we think substantial, risk when it gambled that the previous contrary precedent could be distinguished. We agree with the Commission that there is nothing inhering in this situation that would make it inequitable to require Flota to pay reparations.

Nor do we feel the record reveals that the reparation award is inequitable because Flota had asked for declaratory relief or because that request was pending before the Board for almost two years. In the first place, Flota did not request declaratory relief until after it had entered into the offending exclusive-dealing contract with Panama Ecuador and until it became clear that Consolo was going to sue anyway. Under these circumstances, the Commission was justifiably skeptical about Flota's motives in bringing suit. Further, although Flota's suit was pending for about two years, the record indicates that much of the delay involved in this case was at the request or approval of Flota. At any rate, it has never

²⁵ It is important to distinguish this situation from one where a litigant affirmatively relies upon an agency declaration, later reversed, that specifically authorized particular behavior. See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370.

been the law that a litigant is absolved from liability for that time during which his litigation is pending. *Labor Board v. Electric Cleaner Co.*, 315 U. S. 685; *Louisville & Nashville R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217. During this time Flota was able to postpone the predictable demise of its discriminatory contract and Consolo continued to suffer injury.

Similarly, we do not believe that Flota acquired any "equities" by being caught between the conflicting demands of Consolo and Panama Ecuador. Not only was this a dilemma of Flota's own making, but in 1958 Flota rejected an opportunity to escape it. At that time Panama Ecuador announced that it was going to cancel the contract unless Flota reduced its rates. Although believing itself under no legal obligation to reduce rates, Flota nevertheless did so in order to perpetuate the illegal exclusive-dealing contract with Panama Ecuador. Finally, there was a provision in Flota's contract with Panama Ecuador that absolved Flota from liability for refusing to comply with the contract if it was illegal. Although absolution of liability depended upon the contract being declared, in fact, illegal, in light of the previous *Grace Line* decisions we think this would have been the more reasonable course of action.

Finally we reject the argument that Flota did not benefit from its policy of excluding Consolo and that Consolo lost "only" expected profits. There is evidence in the record that Flota considered its exclusive-dealing contract with Panama Ecuador more profitable than would have been a multiple contract with several shippers.²⁶ If Flota did not believe there was an advantage

²⁶ Flota's operating manager in the United States testified that "it is better to deal with one [shipper] than with three." There is also evidence that Flota had been able to settle Panama Ecuador's claims for shipment damages on a basis of only "2.4% which is a very low percentage in comparison with the usual 15% deduction which applies to this type of transportation."

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in retaining its exclusive contract with Panama Ecuador it is reasonable to think that it would have taken the opportunity given it in 1958 by Panama Ecuador to cancel that contract and offer space equitably to all shippers. Furthermore, we think the court below wrongly minimized the sting of losing expected profits resulting from being unjustly and illegally denied shipping space. Such a loss is real and it is certainly compensable under the Shipping Act. See *McLean v. Denver & Rio Grande R. Co.*, 203 U. S. 38, 48-49; *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H.*, 116 F. 2d 849, cert. denied, 313 U. S. 582.

Without further belaboring this issue, suffice it to say that there is substantial evidence in the record considered as a whole for the Commission to conclude that, "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together." This being so, it was clear error on the part of the Court of Appeals to reverse the Commission's award of reparations.²⁷

Reversed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

²⁷ Because of its disposition of this case, the Court of Appeals found it unnecessary to consider Flota's objection that counsel for the Commission, who participated in the writing of the Commission's reparation award upon remand, had violated 5 U. S. C. § 1004 (1964 ed.) because he had previously participated as Public Counsel in the trial before the Hearing Examiner on the issue of whether Flota had violated the Shipping Act (although not in the trial on the reparations issue) and had defended the Commission's finding of violation and award of reparations before the Court of Appeals in the first consolidated appeals. We have examined Flota's contention in this regard and find it without merit.